TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 171.

A. Y. CHRISMAN AND H. T. CHRISMAN, PLAINTIFFS IN ERROR,

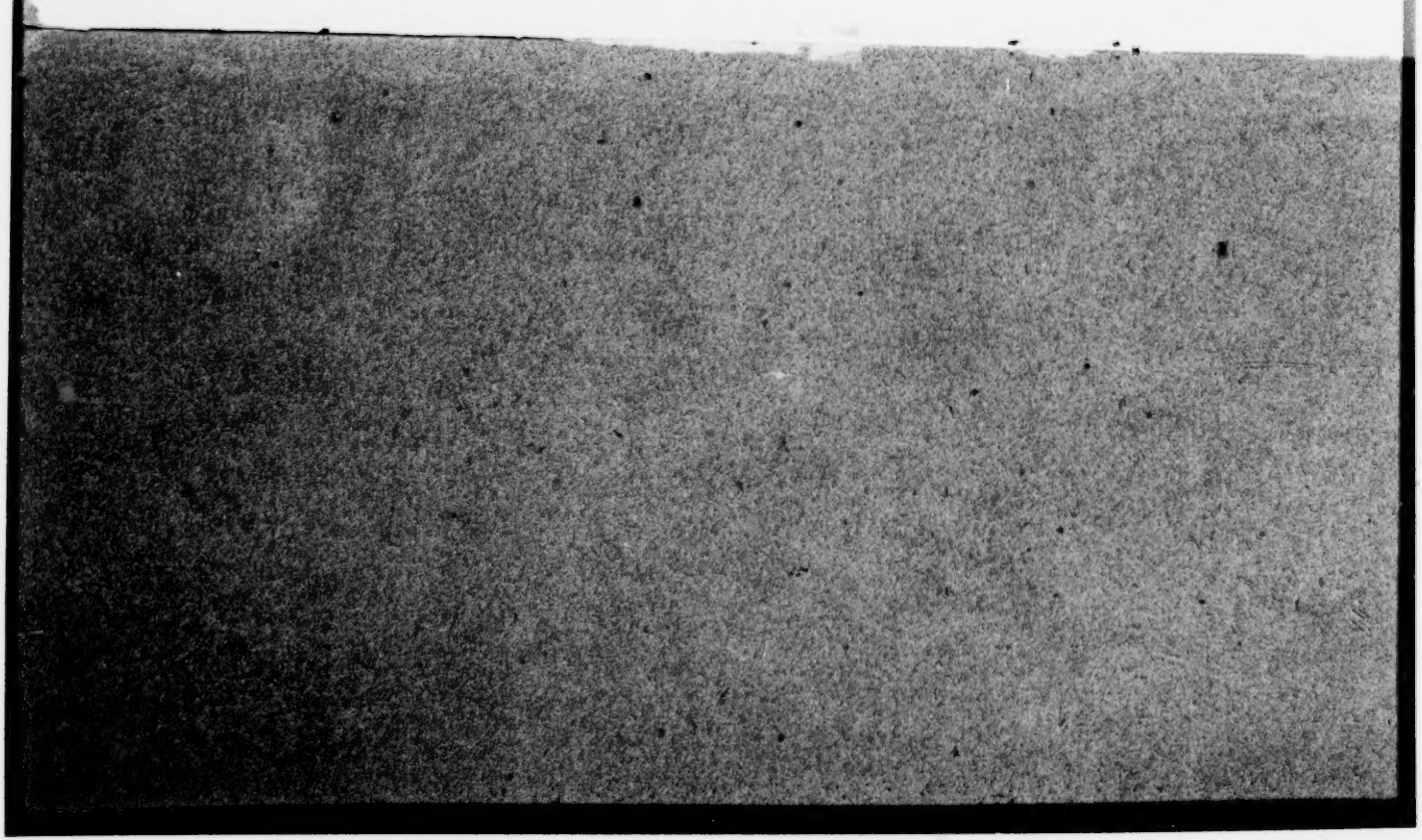
vs.

E. O. MILLER AND THE HOME OIL COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED JANUARY 11, 1905.

(19,193.)



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a In the Supreme Court of the State of California.

E. O. MILLER and THE HOME OIL COMPANY, a Corporation, Plaintiffs and Respondents,
vs.
A. Y. CHRISMAN and H. T. CHRISMAN, Defendants, and J. W. Fewel, Intervenor, Appellants.
} San Francisco, No. 2242.

Transcript on Appeal.

N. C. Coldwell, L. L. Cory, M. K. Harris, Frank H. Short, attorneys for plaintiffs and respondents.
W. R. McQuiddy, Austin & Jones, and Reddy, Campbell & Metson, attorneys for defendants and appellants.
E. O. Larkins, U. T. Clotfelter, and W. S. Badger, attorneys for intervenor and appellant.

Filed this 21st day of February, 1900.

[Seal Supreme Court of California.]

GEO. W. ROOT, *Clerk*,
By A. W. JOHNSON,
Deputy Clerk.

1 In the Supreme Court of the State of California.

E. O. MILLER and THE HOME OIL COMPANY, a Corporation, Respondents,
vs.
A. Y. CHRISMAN & H. T. CHRISMAN, Defendants, and J. W. Fewel, Intervenor, Appellants.

In the Superior Court of the County of Fresno, State of California.

E. O. MILLER and THE HOME OIL COMPANY, a Corporation, Plaintiffs,
vs.
A. Y. CHRISMAN, H. F. CHRISMAN, ET AL., Defendants.
} Complaint.

Come now the plaintiffs and for cause of action against the defendants allege:

I.

That plaintiff, The Home Oil Company, is a corporation duly organized, existing and doing business under the laws of the State of California.

2 II.

That the plaintiffs are ignorant of the names of the defendants who are herein designated as John Doe, Richard Roe, Mary Doe and Susan Stiles, and each and all of said names are fictitious and when the true names of said defendants are discovered plaintiffs will amend this complaint accordingly and set out the true names of said defendants.

III.

That the plaintiff E. O. Miller is the owner of all that certain piece and parcel of land situate in the county of Fresno State of California and more particularly described as follows, to-wit: Commencing at a stake and pile of rocks on which this notice is placed at quarter section corner on the northern boundary line of section 20 in township 19 south, range 15 east, M. D. B. & M., thence running east on the section line, forty chains to the northeast corner of said section 20; thence running south on the eastern line of said section 20, forty chains to a stake at quarter section; thence west forty chains to the legal center of said section 20; thence north forty chains to the place of beginning, and being the northeast quarter of section 20 in township 19 south, range 15 east, M. D. B. & M.

IV.

That the plaintiff, The Home Oil Company, is the lessee of all of said piece and parcel of land under the title of the plaintiff, E. O. Miller and is in the actual possession of the same.

3 V.

That said defendants claim an estate and interest in all of said piece and parcel of land adverse to the said plaintiffs.

VI.

That the claim of the said defendants is without any right whatever and that said defendants have not any estate, right, title, or interest whatever in said land or premises or any part thereof.

Wherefore plaintiffs pray:

1st. That the defendants may be required to set forth the nature of their claims, and that all adverse claims of the said defendants may be determined by a decree of this court.

2nd. That by said decree it be declared and adjudged that the defendants have no estate, right, title or interest whatever in said land and premises.

3rd. That the defendants be forever enjoined and debarred from asserting any claim in and to said premises adverse to the plaintiffs

and that plaintiffs may have such other relief as to this court shall seem meet and agreeable to equity, and for their costs of suit.

N. C. COLDWELL,
L. L. CORY,
M. K. HARRIS,
Attorneys for Plaintiffs.

(Duly verified by E. O. Miller, Oct. 12, 1898)

(Endorsed:) Complaint Filed Oct. 14, 1898. T. G. Hart, clerk. By Ed. E. Bush, dep'y clerk.

4 *Complaint of J. W. Fewel in Intervention.*

(Title of Court and Cause.)

Now comes J. W. Fewel, and by leave of the court first had and obtained, files this as his complaint in intervention in the above entitled cause, and as grounds for his intervention alleges that he holds and claims title to certain portions of the lands set forth in plaintiff's complaint herein to which plaintiffs allege ownership in their complaint, and is entitled to the possession of the same, to-wit: the south half of the northwest quarter of the northeast quarter of section twenty, in township nineteen south, range fifteen east, Mt. Diablo base and meridian, in Fresno county, California, and said intervenor denies and alleges as follows, to-wit:

1. The said intervenor, as to that portion of plaintiff's complaint wherein it is alleged that the said plaintiff, The Home Oil Company, is a corporation duly organized and existing and doing business under the laws of the State of California, alleges that he has no information or belief upon the subject sufficient to enable him to answer thereto and placing his denial upon that ground, denies that the said plaintiff, The Home Oil Company, is a corporation duly organized or existing or doing business under the laws of the State of California.

2. Denies that the said plaintiff, E. O. Miller, is the owner of all, or of any part of that certain piece or parcel of land situate,
5 lying and being in the county of Fresno, State of California, or more particularly described as follows, to-wit: Commencing at a stake or pile of rocks on which this notice is posted at the quarter section corner on the north boundary line of section 20, in township 19 south, range 15 east, M. D. B. & M.; thence running east on the section line forty chains to the northeast corner of said section 20; thence running south on the eastern line of said section 20, forty chains to a stake at quarter section; thence west forty chains to the legal center of said section 20; thence north 40 chains to the place of beginning, and being the N. E. ¼ of section 20, in township 19, range 15 east, M. D. B. & M.

3. That the said intervenor, as to that portion of plaintiffs' complaint wherein it is alleged, "that the plaintiff, The Home Oil Company, is the lessee of all of said piece and parcel of land, under the title of plaintiff, E. O. Miller," alleges that he has no information or belief upon the subject sufficient to enable him to answer and placing his denial upon that ground, denies that the plaintiff, The Home Oil Company is the lessee of all or any part of said piece or parcel of land under the title of said plaintiff, E. O. Miller, or under the title of any other person, or at all; and the said intervenor further denies that said plaintiff, The Home Oil Company, is in the actual possession of all of said premises.

4. Said intervenor alleges that he is the owner and for a long time prior hereto has been the owner of that portion of the
6 land described in plaintiff's complaint as follows to-wit: the south half of the northwest quarter of the northeast quarter of said section 20, township 19 south, range 15 east, M. D. B. & M. and claims title thereto against said plaintiffs and the whole world.

And for a further and separate complaint in intervention herein, and defense in said action, the said intervenor, J. W. Fewel, alleges as follows, to-wit:

I.

That on the 22nd day of December, 1898, the said northeast quarter of said section twenty, in township nineteen south, range fifteen east, M. D. B. & M., situate, lying and being in the county of Fresno, State of California, was a portion of the public domain of the United States of America, and open to exploration and location for mining purposes under the laws of the United States.

II.

That the said above described tract of land was at all times and now is unfit for agricultural or timber culture or grazing purposes and was at all times and now is more valuable for mining purposes than for any other purposes whatever.

III.

That at the times mentioned herein the said intervenor was and is now a citizen of the United States of America, over the age of 21 years; that on the 22nd day of December 1898, the said in-
7 tervenor entered upon and located, under and by virtue of, and in accordance with the laws of the United States, and of the State of California, regulating the sale and appropriation of the mineral lands of the United States, the following described portion of section 20, to-wit: the south half of the northwest quarter of the northeast quarter thereof as a placer mining claim; that on said day the said intervenor posted on the land last above described a notice of location in writing which said notice contained a description of the land claimed therein and thereby, both by metes and

bounds and by reference to the legal subdivision of said section 20; the name of the claim; the name of the locator; the date of the location, and the purpose for which the claim was located, which said notice was signed by the locator therein named, to-wit; this intervenor; that on said day the said intervenor plainly and distinctly marked the boundaries of said claim on the ground so that its boundaries could be readily and easily traced; and thereafter to-wit: on or about the 21st day of January, 1899, said intervenor caused a copy of said notice to be recorded in the office of the county recorder of the county of Fresno, State of California, said county being the county in which said mining claim is situated; that thereafter, to-wit, on or about the 20th day of February, 1899, and within the time limited by law therefor, the said intervenor performed work and labor upon said claim in an amount greatly in excess of the sum of $10.00.

8 IV.

That said section 20 is, and was at all the times mentioned herein, surveyed by the United States; and the said claim located thereon by said intervenor, as aforesaid, was located in such manner that its exterior boundaries and limits conform to the legal subdivisions of said section 20.

V.

That said intervenor made the said above location and holds and claims the lands last hereinbefore described for mining purposes in good faith and for the purpose of developing petroleum and other mineral oils that abound therein, and did on said 22nd day of December 1898, enter into the possession thereof for that purpose, and ever since has been and now is entitled to the exclusive possession and occupancy of the same.

VI.

That the name of the mining claim so located by this intervenor, as aforesaid, is the "Boomer placer claim."

VII.

That the plaintiffs claim to have an estate or interest in the said tract of land last above described adverse to said intervenor, which said claim is without any right or foundation in law or in equity and is fraudulent and void, and is asserted contrary to the laws of the United States of America and of the State of Cali-
9 fornia, governing, regulating and controlling the sale and disposition of the public mineral lands of the United States, in this, to-wit: that on the 14th day of June, 1895, certain persons to-wit: Frank Barrett, Hart H. Barrett, K. W. Brown, J. S. L. McLean, James E. Campbell, James A. McClurg, A. Barieu and J. J. Bright, under and in pursuance of the laws of the United States

governing the locating and appropriating the mineral lands of the United States, located the lands and premises described in plaintiffs' complaint as a placer mining claim to be known as the "King Petroleum placer mining claim." That thereafter, to-wit, on the 24th day of December, 1896, by mesne conveyances, the said plaintiff, E. O. Miller, succeeded to the right, title and interest of the said locators in and to the said "King Petroleum placer mining claim," that during the year 1896, neither the said plaintiff nor any or either of his predecessors in interest in and to the said "King Petroleum placer mining claim," performed or caused to be performed any work or labor thereupon as required by the laws of the United States, by way of annual labor and assessment work, or otherwise; and said intervenor is informed and believes and so alleges upon his information and belief that for the purpose of avoiding the necessity of doing and performing the amount of annual labor or assessment work as required by the laws of the United States for the year 1896, the said plaintiff, E. O. Miller, did, on the 30th day of December 1896, make and execute unto the United States what purported to be an abandonment of all his right, title and interest
10 and of all the right, title and interest of his predecessors in and to the said northeast quarter of said section 20, to the United States, and did immediately thereafter, to-wit, on the 31st day of December 1896, and before said purported abandonment was filed for record in the office of county recorder of Fresno county, together with certain other persons, locate, not only the northeast quarter of said section 20, but also the southwest quarter and the southeast quarter of said section 20, which said locations were made or attempted to be made as follows to-wit, the said plaintiff, E. O. Miller, J. A. Hannah, W. F. Hall, D. G. Overall, Harry Levinson, Chas. H. Smith, L. E. Hall, and R. B. Biddle locating and claiming the said northeast quarter of said section 20, the said plaintiff E. O. Miller, W. G. Dozier, D. G. Overall and others locating and claiming the said southwest quarter of said section 20, and Harry Levinson Chas. H. Smith, L. E. Hall, Cora E. Miller (wife of said plaintiff) Myrtle Hall, J. E. Maxwell and W. G. Dozier, locating and claiming the said southeast quarter of said section 20; that said locations made by said parties other than said plaintiff E. O. Miller, were not made in good faith for the use or benefit of such parties, but were made at the instigation and request of said plaintiff, E. O. Miller, and for his sole use and benefit, and for the purpose of enabling the said E. O. Miller to acquire and hold a greater area of the mineral lands of the United States than the laws of the United
11 States regulating the appropriation thereof permits an individual or an association of individuals to hold or acquire; that within a short time after the location of said lands by the said persons on December 31st 1896, the said J. A. Hannah, W. F. Hall, D. G. Overall, Harry Levinson, Chas. H. Smith, L. E. Hall, and R. B. Biddle, made, executed and delivered to the said plaintiff, E. O. Miller, and did convey to him all their right, title and interest

in and to the said northeast quarter of said section 20, and said intervenor is informed and believes and upon such information and belief alleges the fact to be that the persons mentioned above other than said plaintiff, E. O. Miller, as locating the said southwest and southeast quarters of said section 20, conveyed all their right title and interest in and to the said portion of said section 20, to said plaintiff E. O. Miller, shortly after making the locations thereof; that said location by the said plaintiff, E. O. Miller and the other persons above mentioned, on the said northeast quarter of said section 20, was made in pursuance of and in accordance with a conspiracy, collusion and concerted design upon the part of the said locators or purported locators to secure and appropriate the said lands and to secure title thereto by avoiding and in direct conflict with and opposition to the requirements of the laws of the United States; that said location or attempted location on the said northeast quarter of said section 20, on December 31st, 1896, was a relocation by the original locator and was also made at a time when the
12 land included therein was not open to exploration and location under the laws of the United States and of the State of California, and was therefore premature and invalid and of no force and effect either in favor of said locators or as against this intervenor; that said locations or attempted locations made on December 31st 1896, was contrary to the laws of the United States for the reason that it was and is contiguous to other claims mentioned above and was an attempt to make and hold in violation of the laws of the United States a greater area of the mineral lands of the United States than is or was permitted to be appropriated either by an individual or an association of individuals; that the boundaries of the said claim involving the said northeast quarter of said section twenty were not properly marked upon the ground and were not marked in any manner so that the same can be readily and easily traced; that said intervenor is informed and believes and upon such information and belief alleges the fact to be that the said plaintiff, E. O. Miller, in furtherance of and in pursuance of his design to secure the title to the said northeast quarter of said section 20, entered into a conspiracy and collusion and a concerted design with one George L. Dineley, whereby he, the said E. O. Miller, procured the said George L. Dineley, to make a homestead entry upon the said northeast quarter of said section 20, in the United States land office in Visalia California, on the 20th day of October, 1896;
13 and afterwards the said E. O. Miller made application to the State of California to have the said northeast quarter of said section 20 selected as State indemnity land, which said application was made on or about the 18th day of December, 1896, and did thereafter procure one, Ernest L. Smith, to make application to purchase the said land as such State indemnity selection, and afterwards, on the 14th day of February, 1898, secured the abandonment and relinquishment of the said State indemnity selection.

VIII.

That all of the said acts upon the part of the said plaintiff, E. O. Miller, and upon the part of the other persons named herein, were, are, and constitute, fraud against the said intervenor, and against the United States, so this defendant is informed and believes, and upon such information and belief so alleges the fact to be.

Wherefore said intervenor prays that said plaintiffs take nothing by this action, and that he have judgment for costs incurred herein; that it be adjudged and decreed that this intervenor is the owner and entitled to the immediate and exclusive possession of the lands and premises hereinbefore described as being owned and claimed by him, and that said plaintiffs, and neither of them have any right, title, interest or claim therein or thereto; that he have such other and further relief as may upon the hearing hereof appear to be just and equitable.

14

E. O. LARKINS,
U. T. CLOTFELTER &
W. S. BADGER,
Attorneys for said Intervenor.

(Duly verified.)

Service and receipt of copy of within proposed complaint in intervention admitted this 2d day of May, 1899.

M. K. HARRIS,
Att'y for Pl'ffs.

(Endorsed:) Filed May 2nd, 1899. G. W. Cartwright, clerk. By J. S. Pugh, deputy clerk.

Second Amended Answer of the Defendants A. Y. Chrisman and Henry T. Chrisman.

(Title of Court and Cause.)

Come now the defendants A. Y. Chrisman and Henry T. Chrisman, and leave of the court being first had and obtained file this, their second amended answer to plaintiff's complaint and defendants deny and allege as follows, to-wit:

I.

Defendants allege that the true name of the defendant named in plaintiff's complaint as "H. F. Chrisman" is "Henry T. Chrisman."

II.

The defendants allege, that they have no information or belief upon the subject sufficient to enable them to answer the allegation in plaintiff's complaint that the said plaintiff, The Home Oil Com-

pany, is a corporation, duly organized and existing and doing
15 business under the laws of the State of California, and placing their denial upon that ground these defendants deny, that the said plaintiff, The Home Oil Company, is a corporation duly organized and existing and doing business under the laws of the State of California.

III.

These defendants deny, that the plaintiff E. O. Miller is the owner of all or of any part of that certain piece and parcel of land situate, lying and being in the county of Fresno, State of California, and more particularly described as follows to-wit:

Commencing at a stake and pile of rocks on which this notice is posted at quarter section corner on the northerly boundary line of section twenty, township nineteen south, range fifteen east M. D. B. & M.; thence running east on section line forty chains to the northeast corner of said section twenty; thence running south on the easterly boundary line of said section twenty, forty chains, to a stake at quarter section corner, thence west forty chains to the legal center of said section twenty; thence north forty chains to the place of beginning and being the northeast quarter of section twenty in township nineteen south, range fifteen east M. D. B. & M.

IV.

These defendants allege that they have no information or belief upon the subject sufficient to enable them to answer the alle-
16 gation in plaintiff's complaint that the plaintiff The Home Oil Company is the lessee of all the above described parcel of land under the title of the plaintiff E. O. Miller, and placing their denial upon that ground, these defendants deny, that the said plaintiff The Home Oil Company, is the lessee of all of said above described premises or of any part thereof, under the title of the plaintiff E. O. Miller or under the title of any other person, or at all; and these defendants further deny upon the same ground, that the said plaintiffs or either of them was ever, at any time, or now is, in the actual or any possession of all, or of any part of the said above described tract of land; but on the contrary these defendants allege, that they, the said A. Y. Chrisman and Henry T. Chrisman are now, and ever since the first day of January, 1897 have been, the owners of, entitled to the possession of, and in the peaceable quiet and actual possession of, all that part of said above described tract of land, particularly described as follows:

The south half of the southeast quarter of the northeast quarter and the south half of the southwest quarter of the northeast quarter of said section twenty, township nineteen south, range fifteen east, M. D. B. & M.

V.

These defendants deny, that they or either of them have or claim to have an estate or interest in, or the possession of, or any right to the possession of, all that tract of land and premises described
17 in plaintiffs' complaint, adversely to said plaintiffs or to either of them. On the contrary these defendants allege, that they the said A. Y. Chrisman and Henry T. Chrisman, are now, and ever since the first day of January, 1897, have been, the owners and entitled to the possession of, and in the actual, peaceable and quiet possession of, that portion of the northeast quarter of section twenty, township nineteen south, range fifteen east, M. D. B. & M. described as follows, towit.

The said A. Y. Chrisman is the owner of, entitled to the possession of and in the actual possession of the south half of the southwest quarter of said northeast quarter; and that the said Henry T. Chrisman is the owner of, entitled to the possession of, and in the actual possession of the south half of the southeast quarter of the said northeast quarter. These defendants further deny, that the said ownership and claim of ownership of these defendants or of either of them in and to the tracts of land last above described, is without right, and these defendants deny that they, the said defendants or either of them, have not or has not any estate or right or title or interest whatever in the said land and premises or in and to any part thereof. On the contrary these defendants allege, that they are the owners of and in the actual possession of, those portions of same last above described.

And for a second and further and seperate defense herein, these defendants allege,

I.

18 That on the first day of January 1897, the northeast quarter of section twenty, in township nineteen south, range fifteen east, M. D. B. & M., in the county of Fresno, State of California, was a portion of the public domain of the United States and open to exploration and location for mining purposes under the laws of the United States.

II.

That the said tract of land above described was, at all times and now is, unfit for agriculture, timber culture or for grazing purposes, and was on the first day of January, 1897 and at all times since that date has been, and now is, more valuable for mining purposes than for any other purposes whatever; that said land then was, ever since has been, and now is, chiefly valuable for the petroleum and other mineral oils contained therein.

III.

That on the first day of January, 1897, A. Y. Chrisman, one of these defendants, being then and there a citizen of the United States,

over the age of twenty-one years made a mineral location upon a portion of said northeast quarter of said section twenty, by then and there posting upon the land so claimed by him, a notice containing a description of the land so claimed by him and the name of the locator, and by so marking his said location on the ground that the boundaries thereof could be readily traced; and that his said location is more particularly described as follows:

"Commencing at the center of said section twenty; running
19 thence north forty rods; thence east eighty rods, thence south forty rods; thence west eighty rods to the place of beginning, the said location being named and called "the Beehive placer mining claim," and that a seepage of petroleum or other mineral oil had been discovered by said A. Y. Chrisman upon said tract of land prior to the making of said location, said land being at the time of such location vacant public mineral land.

IV.

That on the first day of January 1897, Henry T. Chrismen, one of these defendants, being then and there a citizen of the United States of America, over the age of twenty-one years made a mineral location upon a portion of the aforesaid northeast quarter of said section twenty, by then and there posting upon the land so claimed by him a notice in writing containing a description of the land so claimed by him and the name of the locator, and by so marking his said location upon the ground that the boundaries thereof could be readily traced; and that his location is more particularly described as follows, to wit:

"Commencing at the southeast corner of the northeast quarter of said section twenty, and running thence north forty rods; thence west eighty rods; thence south forty rods; thence east eighty rods to the place of beginning, the said location being named and called
"the Paradise placer mining claim;" and that a seepage of
20 petroleum and other mineral oil had been discovered by him upon said tract of land prior to the making of said location, said land being at the time of said location vacant public mineral land.

V.

That said section twenty was, on the first day of January, 1897, a part of the public domain of the United States which had previously been surveyed and a plat thereof in the United States land office at Visalia, California; that each of said tracts of land claimed by these defendants as aforesaid for mining purposes, was and is located and was and is describe- in the notice of such locations posted thereon as aforesaid, according to the legal subdivisions of said section twenty and the said locations, as to their exterior boundaries and limits, were made to conform to the boundaries and limits of such legal subdivisions.

VI.

That these defendants made the said above mentioned locations for mining purposes in good faith, and entered into the possession thereof for the purpose of working and mining thereon on the first day of January, 1897, and have since that date done and performed thereon such work and labor and made improvements thereon as is required by the laws of the United States and by the laws of the State of California, and that these defendants have been and now are in the exclusive possession of said tracts of land so claimed by them, and ever since the first day of January, 1897, these
21 defendants have been and now are entitled to the exclusive possession of the tracts of land above described and so claimed by them.

VII.

That the plaintiffs and each of them claim or claims to have an interest or estate in the tracts of land so claimed and held by these defendants adversely to said plaintiffs and that said claim or claims by said plaintiffs and by each of them is without right, and said plaintiffs nor either of them have or has any estate, right, title, claim or interest in or to said tracts of land, or in or to either of them, or in or to any part of either of said tracts.

For a third, further and separate defense to this action, these defendants allege:

I.

That on the 14th day of June, 1895, as these defendants have been informed and believe, certain persons, viz: Frank Barrett, K. W. Brown, James L. McLean, James E. Campbell, James A. McClurg, Sr., Hart H. Barrett, A. Barneau, and J. J. Bright, made or pretended to make upon said northeast quarter of said section twenty, in township nineteen south, range fifteen east, Mt. D. B. & M., a mineral location, which said locators named and called "The King Petroleum mining claim;" that subsequently to-wit: on or about the 24th day of December, 1896, the persons named in the preceding paragraph, made, executed and delivered to the Producers and
22 Consumers Oil Company, a corporation, a deed or deeds conveying to the said Producers and Consumers Oil Company, all the interest, claim and title in and to said tract of land which the said persons or any of them then had or claimed to have; that on or about the 24th day of December, 1896, the aforesaid corporation, the Producers and Consumers Oil Company, made, executed and delivered to E. O. Miller one of the plaintiffs herein, a quit-claim deed conveying and quitclaiming unto the said E. O. Miller all the right, title, claim and interest of said Producers and Consumers Oil Company in and to said northeast quarter of said section twenty, and in and to every part thereof; that thereafter to-wit, on the thirty-first day of December, 1896, the said E. O. Miller, by his written decla-

ration, abandoned, relinquished, and released unto the United States of America all right in and to said tract of land acquired by him from said Producers and Consumers Oil Company and its grantors.

II.

These defendants upon their information and belief allege; that prior to the thirty-first day of December, 1896, and subsequent to the 14th day of June, 1895, E. O. Miller one of the plaintiffs herein entered into a conspiracy and collusion with Frank Barrett, J. A. Hannah and W. F. Hall to fraudulently obtain title to more of the public lands of the United States then known to contain petroleum and other mineral oils and chiefly valuable therefor, than any
23 person or association of persons might legally and rightfully appropriate under the laws of the United States.

III.

These defendants further allege, upon their information and belief that the transfer and conveyance of title from the locators of the aforesaid King Petroleum placer mining claim to the said E. O. Miller was fraudulent and without consideration and made pursuant to the aforesaid conspiracy and collusion between the said E. O. Miller, Frank Barrett, W. F. Hall and J. A. Hannah.

IV.

These defendants further allege upon their information and belief that in pursuance of his fraudulent design to obtain title to said northeast quarter of said section twenty and other contiguous lands, the said E. O. Miller entered into a conspiracy and collusion and concerted design with one George L. Dinely, whereby the said George L. Dinely, at the instigation of, and for the benefit of the said E. O. Miller and his co-conspirators above named, and not for his own benefit, made a homestead entry upon said northeast quarter of said section twenty under the laws of the United States, in the U. S. land office at Visalia, California, on the 20th day of October, 1896, and that thereafter to wit: on or about the 17th day of December, 1896, the said George L. Dinely, at the instigation of the said E. O. Miller and in furtherance of his fraudulent design as aforesaid, relinquished and abandoned his said homestead entry.

24 V.

These defendants further allege, upon their information and belief, that said E. O. Miller in furtherance of the aforesaid conspiracy and collusion and of his fraudulent design to acquire title to said northeast quarter of said section twenty, entered into a conspiracy and collusion and concerted design with one Ernest L. Smith on or about December 15th, 1896, whereby the said Ernest L. Smith

upon the instigation of the said E. O. Miller and for the benefit of the said E. O. Miller and his co-conspirators as aforesaid, made application on said date, to the surveyor general of the State of California, to purchase said northeast quarter of said section twenty as school land belonging to said State of California, and requested and procured of the surveyor general of said State that he make application to the Land Department of the United States to have said tract of land set over and transferred to said State of California in lieu of other lands granted to said State by the United States but lost to the State by reason of their being mineral or saline; and that such selection by the surveyor general of the State of California was duly made on or about the 17th day of December, 1896; that on or about the 14th day of February, 1898, the aforesaid Ernest L. Smith at the instigation of the said E. O. Miller and for the benefit of the said E. O. Miller, and not for his own benefit, relinquished and abandoned his application to purchase said tract of land
25 from the State of California, and caused the surveyor general of said State to withdraw his indemnity selection of same.

III.

These defendants further allege upon their information and belief, that on or about the forenoon of the 31st day of December, 1896, the said E. O. Miller and J. A. Hannah and W. F. Hall for their own benefit and in furtherance, of their aforesaid fraudulent design to acquire title to said northeast quarter of said section twenty, went upon said tract of land and posted thereon a notice in writing that they claimed said northeast quarter and the whole thereof for mining purposes under the laws of the United States, to which notice the following names were attached as the names of the locators of the said mining claim, to wit: E. O. Miller, W. F. Hall, D. G. Overall, Harry Levinson, Chas. H. Smith, J. A. Hannah, L. E. Hall and R. B. Biddle and that the use of the names of L. E. Hall, R. B. Biddle, D. G. Ooverall, Chas. H. Smith and Harry Levinson as locators was without their privity and consent and not for their benefit, but for the benefit only of the said E. O. Miller, J. A. Hannah and W. F. Hall and in furtherance of their fraudulent design to acquire title to said northeast quarter of the said section twenty.

These defendants further allege, upon their information and belief, that on said 31st day of December, 1896, the aforesaid, E. O. Miller, W. F. Hall and J. A. Hannah in furtherance of their fraudu-
26 lent design to acquire title to more of the mineral lands of the United States than the law allows to be acquired by an individual or association of individuals, posted upon the southeast quarter of said section twenty, a notice in writing, claiming said tract of land and the whole thereof as mineral land, in which notice the following names were written as the names of the locators of said mining location, to wit: W. G. Dozier, Harry Levinson, J. E. Maxwell, Myrtle Hall, Cora E. Miller, Kate Hannah, Chas. H. Smith

and L. E. Hall, and that the use of the names of all of said pretended locators was without the privity and consent of the persons so named, and not for the benefit of such persons, but for the benefit of the said E. O. Miller, W. F. Hall and J. A. Hannah and in furtherance of their aforesaid fraudulent design and intent.

V.

These defendants further allege, upon their information and belief, that on the forenoon of the aforesaid 31st day of December, 1896 the aforesaid E. O. Miller, W. F. Hall and J. A. Hannah, in furtherance of their fraudulent design to acquire title to more of the mineral land of the United States than the laws of the said United States allow to be acquired by any individual or association of individuals posted upon the southeast quarter of said section twenty, a notice in writing claiming said tract of land and the whole thereof for mining purposes, in which notice were written the following names as the names of locators of said mining location, to wit: Ernest L. Smith, J. A. Hannah, Chas. H. Smith, W. F. Hall, W. G. Dozier, Herman J. Miller, J. E. Maxwell and D. G. Overall; and that the use of the names of D. G. Overall, J. E. Maxwell, Herman J. Miller, W. G. Dozier, Chas. H. Smith and Ernest L. Smith as locators was without the privity and consent of the persons so named and not for their benefit, but for the benefit only of the said E. O. Miller, J. A. Hannah and W. F. Hall, and in furtherance of their aforesaid fraudulent design to acquire title to said tract of land.

27

VI.

These defendants further allege upon their information and belief that the aforesaid attempted locations by the said E. O. Miller and his associates upon said section twenty were and are fraudulent and void as against the United States and against these defendants and *was* made and attempted to be made contrary *of* the laws of the United States and of the State of California relating to the location and possession and appropriation of the mineral lands of the United States in the following particulars, to wit:

1st. Said locations were not made in good faith by said locators.

2nd. Said locations were an attempt at relocating the same lands by original locators.

3rd. Said attempted locations were made for the express purpose of avoiding the necessity of doing and performing the assessment work upon said claims for the year 1896, and to avoid the making of improvements upon said claims during said year 1896, as required by the laws of the United States and of the State of California.

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4th. Said attempted locations were made in pursuance of a conspiracy, collusion and concerted design upon the part of the said E. O. Miller, W. F. Hall and J. A. Hannah to secure and appro-

priate said lands and acquire title thereto by avoiding the provisions and requirements of the laws of the United States and by fraud.

5th. Said E. O. Miller, W. F. Hall and J. A. Hannah by said attempted locations were seeking to acquire and hold to themselves and for their benefit a greater amount of the mineral land of the United States than the laws of the United States allow or permit an individual or association of individuals to appropriate and hold.

6th. That said tracts of land are contiguous and form in fact but one body of land, so that several claims by one individual or one association of individuals thereon cannot be made and held.

Wherefore, these defendants pray,

1st. That said plaintiffs may be required to set forth the nature of their claim or claims to the tracts of lands claimed by these defendants and in and to any part thereof, and that all adverse claims of said plaintiffs may be determined by a decree of this court.

2nd. That by said decree, it be declared and adjudged that
29 said plaintiffs and each of them have and has no estate, right, title, claim or interest in and to, the tracts of land claimed by these defendants or in and to any part thereof.

3rd. That said plaintiffs and each of them be forever enjoined and debarred from asserting any claim in and to said tracts of land, and in and to every part thereof, adverse to these defendants.

4th. That these defendants have such other and further relief as to the court may seem meet and agreeable to equity and judgment for their costs herein.

REDDY, CAMPBELL & METSON,
W. R. McQUIDDY,
HORACE L. SMITH,
AUSTIN & JONES, AND
E. O. LARKINS,
Attorneys for the Defendants, A. Y. Chrisman & Henry T. Chrisman.

(Duly verified.)

Service of the above 2d amended answer is hereby admitted this 20th day of May, 1899.

N. C. COLDWELL,
M. K. HARRIS,
L. L. CORY,
Attorney- for Pl'ffs.
E. O. LARKINS,
U. T. CLOTFELTER, &
W. S. BADGER,
Att'ys for said Intervenor.

(Endorsed:) Filed May 20, 1899. G. W. Cartwright, clerk. By J. E. Cartwright, deputy clerk.

30 *Answer of Plaintiffs to Complaint in Intervention.*

(Title of Court and Cause.)

Come now the plaintiffs in the above entitled action, and answering the complaint of J. W. Fewel in intervention herein, deny and allege as follows, to-wit:

I.

They deny that on the 22nd day of December, 1898, the northeast quarter of section twenty, township nineteen south, of range fifteen east, M. D. B. & M., situated in Fresno county, State of California, was a portion of the public domain of the United States of America, or open to exploration or location for mining purposes, under the laws of the United States.

II.

Plaintiffs deny on their information and belief, that on the 22nd day of December, 1898, said intervenor entered upon or located, under and by virtue of, or in accordance with the laws of the United States, or of the State of California, regulating the sale and appropriation of the mineral lands of the United States, or at all, the following described portion of said section twenty, to-wit: the south half of the northwest quarter thereof as a placer mining claim, or that on said day said intervenor posted on said above described land a notice of location in writing, which said notice contained a description of the land claimed therein or thereby, both by metes and bounds or by reference to the legal subdivision of
31 said section 20, the name of the claim, the name of the locator, the date of the location, or the purpose for which said claim was located, or that said notice was signed by the locator therein named, to wit, said intervenor, or that on said day said intervenor plainly or distinctly, or at all, marked the boundaries of said claim on the ground so that its boundaries could be readily or easily traced, or that he marked the boundaries of said alleged claim in any other manner, or that thereafter, on or about the 21st day of January, 1899, said intervenor caused a copy of said notice to be recorded in the office of the county recorder of the county of Fresno, State of California, or that on or about the 20th day of February, 1899, or within the time limited by law therefor, or at any other time, or in any other manner, said intervenor performed work or labor upon said claim in an amount in excess of the sum of $10.00, or in any other amount, or at all.

III.

Plaintiffs deny upon their information and belief, that said alleged claim located by said intervenor, was located in such a manner that

its exterior boundaries or limits conform to the legal subdivision of said section 20.

IV.

Plaintiffs deny that said intervenor made said above location, or holds or claims said lands for mining purposes in good faith, or for the purpose of developing petroleum and other mineral oils that abound therein, or that said alleged location was made by
32 said intervenor, or that he holds or claims said land for any other purposes, or at all, or that he did on the 22nd day of December, 1898, or at any other time, enter into the possession of said land for any of said purposes alleged in paragraph V of said complaint in intervention, or for any other purposes, or ever since said time has been, or now is, entitled to the exclusive or any possession or occupancy of said land.

V.

Plaintiffs further deny upon their information and belief, that the name of said alleged mining claim so alleged to have been located by said intervenor, is the "Boomer placer claim," or that it has any other name.

VI.

Plaintiffs admit that they claim an estate and interest in said tract of land last above described adverse to said intervenor, but deny that said claim is without any right or foundation in law or in equity, or that the same is fraudulent or void, or is asserted contrary to the laws of the United States of America, or of the State of California, governing, regulating or controlling the sale or disposition of the public mineral lands of the United States; that as to the allegation in paragraph VII in said complaint, that on the 14th day of June, 1895, Frank Barrett and the other persons therein named, located said land and premises, plaintiffs have no information or belief sufficient to answer said allegation, and placing their denial upon that ground they deny that on the 14th
33 day of June, 1895, the persons named in said complaint in intervention, located the lands and premises described in plaintiffs' complaint as a placer mining claim to be known as the "King Petroleum placer mining claim," under and in pursuance of the laws of the United States governing the locating and appropriating the mineral lands of the United States; they admit that on the 24th day of December, 1896, by mesne conveyances this plaintiff, E. O. Miller, succeeded to the right, title and interest of said alleged locator in and to the said King Petroleum placer mining claim; deny that during the year 1896, neither the said plaintiff, E. O. Miller, or any or either of his predecessors in interest in and to the said King Petroleum placer mining claim, performed or caused to be performed any work or labor thereupon as required by the laws of the United States, by way of annual labor and assess-

ment work, or otherwise; deny that for the purpose of avoiding the necessity of doing and performing, or doing or performing the amount of annual labor or assessment work, as required by the laws of the United States, for the year 1896, the said plaintiff, E. O. Miller, did on the 30th day of December, 1896, or upon any day whatever make and execute, or make or execute, unto the United States what purported to be an abandonment of all his right, title and interest, or of all or any of his right, title or interest or of all or any of the right, title or interest of his predecessors in interest in and to the said northeast quarter of said
34 section 20 to the United States; they admit that the plaintiff, E. O. Miller, together with the proper persons in said complaint in intervention named, did on the 31st day of December, 1896, make the location and locate the lands in said complaint in intervention mentioned and described; deny that said location, or any location made by said parties other than plaintiff, E. O. Miller, were not made in good faith for the use and benefit of such parties, and deny that said location, or any of said locations were made by said parties, or any of said parties, at the instigation and request or instigation or request of said plaintiff, E. O. Miller, and deny that said locations or any of said locations were made by said parties or any of said parties, for the sole use and benefit, or use or benefit of the said E. O. Miller, or for the purpose of enabling the said E. O. Miller to acquire and hold a greater area of the mineral lands of the United States than the laws of the United States regulating the appropriation thereof permits an individual or an association of individuals to hold or acquire; admit that after the location of said lands by said persons on the 31st day of December, 1896, said J. A. Hannah, W. F. Hall, D. G. Overall, Harry Levinson, Chas. H. Smith, L. E. Hall and R. B. Biddle, made, executed and delivered to the said E. O. Miller, and that they did convey to him all their right, title and interest in and to the said northeast quarter of said section 20, and in this behalf they allege that said persons executed and delivered said convey-
35 ance to said Miller on the — day of ——, A. D., 1897, and that said conveyance was made for a good valuable consideration: they deny that said location by the said plaintiff, E. O. Miller, and the other persons mentioned in said complaint in intervention, on the said northeast quarter of said section 20, was made in pursuance of, and in accordance with a conspiracy, collusion and concerted design, or conspiracy, or collusion, or concerted design upon the part of the said locator to secure and appropriate, or to secure or appropriate the said lands, or to secure title to said lands by avoiding and in direct conflict with, or by avoiding or in direct conflict with, or in opposition to the requirements of the laws of the United States. They deny that said location on said northeast quarter of said section 20, on December 31st, 1896, was a re-location by the original locator, and they deny that said location was made at a time when the land included therein was not open to explora-

tion and location under the laws of the United States, and of the State of California, and deny that said location was for any cause premature and invalid, and of no force and effect, or that the same was premature or invalid, or of no force and effect, or of no force or effect, either in favor of said locators, or as against this intervenor, and they deny that said location so made on December 31st, 1896, was contrary to the laws of the United States, for the reason that it was, and is, contiguous to other claims mentioned in said
36 complaint in intervention, and was an attempt to make and hold in violation of the laws of the United States a greater area of the mineral lands of the United States than is, or was, permitted to be appropriated either by an individual or an association of individuals, and deny that said location was contrary to the laws of the United States, for any cause or reason whatever, or at all; they deny that the boundaries of the said claim involving the said northeast quarter of said section 20, were not properly marked upon the ground, or that the same were not marked in any manner so that the same can be readily or easily, or readily or easily traced; they deny that the said plaintiff, E. O. Miller, in furtherance of, and in pursuance of, or in furtherance of, or in pursuance of his design to secure the title to the said northeast quarter of said section 20, or for any purpose whatever, or at all, entered into a conspiracy and collusion, and a concerted design, or a conspiracy, or collusion or a concerted design with one George L. Dineley, whereby the said E. O. Miller procured the said George L. Dineley to make a homestead entry upon said northeast quarter of said section 20, in the United States land office, in Visalia, California, on the 20th day of October, 1896, or in any land office whatever, on any day or date whatever; deny that the said E. O. Miller did at any time whatever in pursuance to any conspiracy, collusion or concerted design whatever, make application to the State of California to have the said northeast quarter of said section 20 selected as State indemnity land, and they
37 deny that the said E. O. Miller did, at any time whatever, in pursuance to any conspiracy, collusion or concerted design, or at all, procure one Earnest L. Smith, to make application to purchase said land as such State indemnity selection, or that he did at any time whatever in pursuance of any conspiracy, collusion or concerted design whatever, secure the abandonment and relinquishment of the said State indemnity selection.

VII.

They deny that all of the said acts, or any of the acts upon the part of the said plaintiff, E. O. Miller, or upon the part of the other persons named in said complaint in intervention, as set out and alleged in said complaint in intervention, were, are and constitute, or were, or are, or constitute fraud against the said intervenor, or against the United States.

Wherefore, these plaintiffs pray that intervenor take nothing by

his complaint in intervention herein, and that they have their costs in this behalf expended.

N. C. COLDWELL,
L. L. CORY,
M. K. HARRIS,
Attorneys for Plaintiffs.

(Duly verified.)

Service of the above answer is hereby admitted this 26 day of May, 1899.

E. O. LARKINS,
U. T. CLOTFELTER, &
W. S. BADGER,
Attorney- for Intervenor.

(Endorsed:) Filed May 26, 1899. G. W. Cartwright, clerk.

38 *Findings.*

(Title of Court and Cause.)

This cause having been called regularly for trial before the court, sitting without a jury, a jury trial having been expressly waived by stipulation of the parties made in open court and entered upon the minutes, M. K. Harris, Esq., L. L. Cory Esq., Frank H. Short, Esq., N. C. Coldwell, Esq. and J. A. Hannah, Esq. appeared as attorneys for the plaintiffs; and W. R. McQuiddy, Esq., W. H. Metson, Esq., S. J. Hinds, Esq. and Messrs. Austin & Jones appeared as attorneys for the defendants A. Y. Chrisman and H. T. Chrisman; and W. S. Badger, Esq. and U. T. Clotfelter, Esq. appeared as attorneys for J. W. Fewel, intervenor herein; and said action was dismissed as against the defendants John Doe, Richard Roe, Mary Doe and Susan Stiles.

Evidence both oral and documentary was offered and introduced by and in behalf of the said plaintiffs and by and in behalf of the said defendants, A. Y. Chrisman and H. T. Chrisman, and by and in behalf of the said J. W. Fewel, intervenor; and the court having heard the proofs of the said parties and considered the same, and the records and papers in the cause, and the arguments of the respective attorneys thereon, and the cause having been submitted to the court for its decision, the court now finds the following facts:

I.

39 That the plaintiff, The Home Oil Company, is a corporation duly organized and existing and doing business under the laws of the State of California.

II.

That the plaintiff E. O. Miller is the owner of all that certain piece and parcel of land situate in the county of Fresno, State of

California and more particularly described as follows, to-wit: Commencing at a stake and pile of rocks placed at the quarter section corner on the northern boundary line of section 20, in township 19 south, range 15 east, Mt. Diablo base and meridian, and running thence east on the section line 40 chains to the northeast corner of said section 20, thence running south on the east line of said section 20,40 chains to a stake at quarter section corner, thence west 40 chains to the legal center of said section 20, thence north 40 chains to the place of beginning, being the northeast quarter of section 20, in township 19 south, range 15 east, Mt. Diablo base and meridian.

III.

That the plaintiff The Home Oil Company is the lessee of all said pieces and parcels of land under the title of the plaintiff E. O. Miller and at the commencement of this action was, ever since has been and is now in the actual possession of the same, and of every part thereof.

IV.

That the said defendant A. Y. Chrisman claims an estate
40 and interest adverse to the said plaintiffs in that part of said piece and parcel of land described as follows: the south half of the southwest quarter of said northeast quarter; and the said defendant H. T. Chrisman claims an estate and interest adverse to the plaintiffs in that part of said piece and parcel of land described as follows: the south half of the southeast quarter thereof.

V.

That the claim of the said defendant A. Y. Chrisman is without any right whatever, and that said defendant A. Y. Chrisman has not any estate, right title or interest whatever in said land or premises, or in or to any part thereof; and that the claim of the said defendant H. T. Chrisman is without any right whatever, and that said defendant H. T. Chrisman has not any estate, right, title, or interest whatever in and to said land or premises or any part thereof.

VI.

That on the 31st day of December, 1896, the said northeast quarter of said section 20, in township 19 south, range 15 east, Mount Diablo base & meridian, was a portion of the public domain of the United States, open to exploration and location for mining purposes under the laws of the United States.

VII.

That the said tract of land was then, and at all times since has been, and now is unfit for agricultural, timber culture, or for
41 grazing purposes, and was on said 31st day of December, 1896, and at all times since that date has been and now is

more valuable for mining purposes than for any other purpose whatever; and that said land then was, ever since has been and now is chiefly valuable for the petroleum and other oils contained therein.

VIII.

That on the 31st day of December, 1896, J. A. Hannah, E. O. Miller, W. F. Hall, D. G. Overall, L. E. Hall, Harry Levinson, R. B. Biddle and Charles H. Smith, and each of them, were then and there citizens of the United States, over the age of 21 years; and the said parties did, on said 31st day of December, 1896, as an association of persons, make a mineral location upon all of said northeast quarter of said section 20, by then and there posting upon said land so claimed by them a notice containing a description of the land so claimed by them, and the names of them the said locators, and by then and there marking their said location on the ground so that the boundaries thereof could be readily traced; which said notice so posted by said locators was thereafter, to-wit: on the 5th day of January, 1897, duly recorded in volume "K" of Mining Claims, at page 445, records of the county of Fresno, State of California.

IX.

That on the 31st day of July, one thousand eight hundred and ninety-seven, the said J. A. Hannah, W. F. Hall, D. G. Over-
42 all, Harry Levinson, Charles H. Smith, L. E. Hall and R. B. Biddle, for a good and valuable consideration, granted, bargained, sold, conveyed and confirmed unto the plaintiff E. O. Miller, all their right, title, interest, estate and ownership in and to said northeast quarter of said section 20, and all their right, title, interest, estate and ownership in, under, or by virtue of said mineral location so made on the 31st day of December, 1896, and the said E. O. Miller did thereafter, to-wit: on the 17th day of September, 1897, for a good and valuable consideration, lease unto one Frank Barrett, of the county of Fresno, State of California, for a period of ten years from and after the date of said lease, all of said described property, for the purposes of digging, boring and excavating for petroleum and other fluid products, and said Frank Barrett thereupon went into possession of all of said property under and by virtue of the terms of said lease; and thereafter, on the 17th day of September, 1897, the said Frank Barrett, for a good and valuable consideration, did assign, transfer and set over said lease and all the right, title and interest thereunder granted to him, to the plaintiff Home Oil Company; and the plaintiff Home Oil Company thereupon went into the immediate possession of all of said property, under and by virtue of the terms of said lease, and ever since has been and now is in the exclusive possession of all of the same and of every part thereof.

43 X.

That immediately after going into possession of said northeast quarter of said section 20, the said plaintiff, Home Oil Company, commenced digging, boring and excavating thereon for petroleum and other fluid products, and has expended in such work the sum of more than thirty thousand dollars, and by means of such digging, boring and excavating discovered large quantities of petroleum therein, and there now exists, and did at the commencement of this action, wells of great depth, sunk and excavated upon said property by said Home Oil Company, from which there is a daily flow of large quantities of petroleum of great value.

XI.

That ever since the 17th day of September, 1897, the said plaintiff, Home Oil Company, has been and is now in the sole and exclusive possession of all of said real property and engaged in working, developing and mining the same and extracting petroleum and other fluid products therefrom.

XII.

That on the 1st day of January, 1897, the said northeast quarter of section 20, in township 19 south, range 15 east, Mount Diablo base and meridian, in the county of Fresno, State of California, was not open to exploration and location, or exploration or location for mining purposes under the laws of the United States.

44 XIII.

That on the 1st day of January, 1897, the defendant A. Y. Chrisman was a citizen of the United States, over the age of 21 years, and did enter upon that portion of said northeast quarter of said section 20 described as follows, to wit: bounded by a line commencing at the center of said section 20, running thence north 40 rods, thence east 80 rods, thence south 40 rods, thence west 80 rods to the place of beginning, and did then post upon said part of said section 20 a notice containing a description of said part of said northeast quarter of said section 20, and that he claimed the said land for mining purposes, under the laws of the United States of America, and such notice was signed by said A. Y. Chrisman, and said defendant did on said date mark the boundaries of said portion of said land so that the same could be readily traced.

XIV.

That on the 1st day of January, 1897, H. T. Chrisman was a citizen of the United States, over the age of 21 years, and did on said day enter upon that part of said northeast quarter of said section 20, as follows to-wit: bounded by a line commencing at the south-

east corner of the northeast quarter of said section 20, running thence north 40 rods, thence west 80 rods, thence south 40 rods, thence east 80 rods to the place of beginning, and did then post upon said part of said section 20 a notice containing a de-
45 scription of said part of said northeast quarter of said section 20, and that the claimed the said land for mining purposes under the laws of the United States of America, and such notice was signed by the said H. T. Chrisman, and said defendant did on said date mark the boundaries of said portion of said land so that the same could be readily traced.

XV.

That said defendant A. Y. Chrisman never at any time discovered a seepage of petroleum or other mineral oil upon said land or any part thereof, and the defendant H. T. Chrisman never discovered a seepage of petroleum or other mineral oil upon said land or upon any part thereof, and that the only discovery of petroleum or any other fluid produce upon said lands or upon any part thereof is the discovery made by the plaintiff Home Oil Company as in these findings before stated.

XVI.

That on the 31st day of December, 1896, and for a long time prior thereto the said section 20 had been and ever since has been and is now a part of the public domain of the United States.

XVII.

That on the said 1st day of January, 1897 no part of the said northeast quarter of section 20 was vacant, public mineral land or open to exploration or location for mining purposes, but on the contrary the whole of said northeast quarter of said section 20 was then in the possession of J. A. Hannah, E. O. Miller, W. F.
46 Hall, D. G. Overall, L. E. Hall, Harry Levinson, R. B. Biddle and Charles H. Smith, under and by virtue of their location of said land hereinbefore mentioned.

XVIII.

That the said defendants A. Y. Chrisman and H. T. Chrisman did not make the location for mining purposes hereinbefore mentioned in good faith, and did not nor did either of them enter into the possession thereof or any part of the same for the purpose of working and mining thereon on the 1st day of January, 1897, or upon any other date; and said defendants have not and neither of them has since the first day of January, 1897, or since any date whatever, done and performed upon said land or any part thereof such work and labor or made improvements thereon as is required by the laws of the United States or of the State of California; and

that the said defendants have not been and neither of them has been in the exclusive possession of said tracts of land so claimed by them; and said defendants are not, and neither of them is in the possession of said tracts of land so claimed by them or either of them, or any part thereof; and the said defendants ever since the said 1st day of January, 1897, or since any day whatever or at all have not been nor are they or either of them now entitled to the exclusive or any possession of the tracts of land claimed by them or any part thereof, nor are said defendants entitled, nor is either of them entitled,
47 to the exclusive or any possession whatever of any part of said northeast quarter of said section 20, in township 19 south, range 15 east, Mt. Diablo base & meridian.

XIX.

That the plaintiffs claim and each of the plaintiffs claims to have an interest and estate in the tracts of land claimed by the defendants A. Y. Chrisman and H. T. Chrisman adversely to said defendants; and that said claims of the said plaintiffs and the claims of each of them is not without right, but upon the contrary is with right and is good and valid; and the said plaintiffs have and each of them has an estate, right, title, claim and interest in and to said tracts of land and in and to the whole thereof.

XX.

That on the 14th day of June, 1895, certain persons, viz: Frank Barrett, K. W. Brown, James L. McLean, James E. Campbell, James A. McClurg, Sr., Hart H. Barrett, A. Barieau and J. J. Bright pretended to make upon said northeast quarter of said section 20 in township 19 south, range 15 east, M. D. B. & M. a mineral location, which was called the King Petroleum mining claim, and that subsequently, to-wit: on or about the 24th day of December, 1896, the said persons made, executed and *and* delivered to the Producers & Consumers Oil Company, a corporation, a deed conveying to the said Producers & Consumers Oil Company all the interest, claim and title to the said tract of land which the said persons or
48 any of them had or claimed to have: that on or about the 24th day of December, 1896, the aforesaid corporation the Producers & Consumers Oil Company made, executed and delivered to E. O. Miller, one of the plaintiffs herein, a quitclaim deed conveying and quit-claiming unto the said E. O. Miller all the right, title, claim and interest of said Producers & Consumers Oil Company in and to said northeast quarter of said section 20, and in and to every part thereof; that thereafter, to-wit: on the 31st day of December, 1896, the said E. O. Miller, by his written declaration, abandoned and relinquished and released unto the United States of America all right in and to said tracts of land acquired by him from said Producers & Consumers Oil Company and its grantors.

XXI.

That on the said 14th day of June, 1895, the said Frank Barrett, K. W. Brown, James L. McLean, James E. Campbell, James A. McClurg, Sr., Hart H. Barrett and J. J. Bright were not citizens of the United States, nor were they or either of them qualified to make a mineral location under the laws of the United States and the laws of the State of California, and said persons did not in fact make said mineral location or any mineral location on the said 14th day of June, 1895; and neither said parties nor any of them, nor the said Producers & Consumers Oil Company, nor the said E. O. Miller ever had or held any right, title, interest, claim, possession or
49 right of possession in and to said property or any part thereof under said attempted location or under said deeds of conveyance or under and by virtue of said deeds of conveyance or either of said deeds of conveyance hereinbefore mentioned.

XXII.

That after the execution of the deed of conveyance hereinbefore mentioned by said Frank Barrett, K. W. Brown James L. McLean, James E. Campbell, James A. McClurg, Sr., Hart H. Barrett, A. Barieau and J. J. Bright to the Producers & Consumers Oil Company the said parties and each and all of them abandoned possession of said property and each and every part thereof and all their right, title, interest, claim and demand in and to said property under and by virtue of said pretended mineral location, and that after the execution of said deed of conveyance hereinbefore mentioned by the said Producers & Consumers Oil Company to the said E. O. Miller, and before the 31st day of December, 1896, the said Producers & Consumers Oil Company abandoned possession of said property and each and every part thereof, and abandoned all their right, title, interest, claim, possession and right of possession acquired or claimed under and by virtue of said pretended mining location.

XXIII.

That all the allegations made and contained in paragraphs numbered II, III, IV, III, V and VI of the 3rd further and sepa-
50 rate defense contained in the second amended answer of the said defendants A. Y. Chrisman and H. T. Chrisman, and each and every one of said allegations, are untrue.

XXIV.

That the intervenor J. W. Fewel is not now the owner and has never been the owner of that portion of the land described in plaintiff's complaint as follows, to-wit: The south half of the northwest quarter of the northeast quarter of said section 20, in township 19 south, range 15 east, Mt. Diablo base & meridian. That said inter-

venor claims title thereto against the plaintiff and the whole world, but said claim is without any right or foundation whatever.

XXV.

That on the 22nd day of December, 1898, the said northeast quarter of said section 20, in township 19 south, range 15 east, M. D. B. & M. situate, lying and being in the county of Fresno, State of California, was a portion of the public domain of the United States of America, and the same was then, at all times since has been and now is unfit for agriculture or timber culture or grazing purposes, and was at all times and now is more valuable for mining purposes than for any other purpose whatever.

XXVI.

That on the said 22nd day of December, 1897, the said northeast quarter of said section 20, township 19 south, range 15 east M. D. B. & M. situate, lying and being in the county of Fresno, State
51 of California, was not open to exploration and location for mining purposes under the laws of the United States.

XXVII.

That the said intervenor J. W. Fewel is now and at all times hitherto has been a citizen of the United States of America, and upon the said 22nd day of December, 1898, was over the age of 21 years.

XXVIII.

That the intervenor J. W. Fewel did not on the 22nd day of December, 1898, or upon any date enter upon and locate under and by virtue or in accordance with the laws of the United States and with the laws of the State of California regulating the sale and appropriation of the mineral lands of the United States any portion of said section 20, but on said day said intervenor posted on the south half of the northwest quarter of the northeast quarter of said section 20 a notice of location in writing, which said notice contained a description of the land claimed therein and thereby both by metes and reference to the legal subdivisions of said section 20; the name of the claim; the name of the locator; the date of the location and the purpose for which the claim was located, which said notice was signed by the locator therein named, to-wit: the said intervenor; and that thereafter, to-wit: on or about the 20th day of January, 1899, said intervenor caused a copy of said notice to be recorded in
52 the office of the county recorder of the county of Fresno, State of California, said county being the county in which said mining claim was situated; but said locator did not on said 22nd day of December, 1898, nor upon any day, mark the boundaries of his said claim on the ground so that his boundaries

could be readily and easily traced, nor did said intervenor on said day or on any day mark the boundaries of his said claim in any manner whatever, nor within the time limited by law therefor or at any other time or in any other manner did said intervenor perform work or labor upon said claim to an amount in excess of the sum of ten dollars or in any other amount or at all.

XXIX.

That all the allegations contained in the paragraph marked IV of said complaint in intervention and each and every one of said allegations are untrue.

XXX.

That all the allegations contained in paragraph marked V of said complaint in intervention are and each and every one of said allegation- is untrue.

XXXI.

That the plaintiffs claim an estate and interest in the tract of land last above described adverse to the said intervenor, which said claim is not without right or foundation in law or in equity, nor is said claim fraudulent or void, nor is the same asserted contrary to the laws of the United States of America or the laws of the State of California regulating and controlling the disposition of the
53 public mineral lands of the United States; but, upon the contrary, said claim is with right and is founded in law and in equity and is good and valid and is asserted in conformity with the laws of the United States and the laws of the State of California governing and regulating and controlling the sale and disposition of the public mineral lands of the United States.

XXXII.

That Frank Barrett, Hart H. Barrett, K. W. Brown, Jas. L. McLean, James E. Campbell, James A. McClurg, Sr., A. Barieau and J. J. Bright did not on the 14th day of June, 1895, or on any day whatever, under and in pursuance of the laws of the United States governing the locating and appropriating of the mineral lands of the United States locate the lands and premises described in plaintiff's complaint or any part of said lands and premises as a placer mining claim.

XXXIII.

That said plaintiff E. O. Miller did on the 31st day of December, 1896, make and execute unto the United States what purported to be an abandonment of all his right, title and interest and of all the right, title and interest of his predecessors in and to said northeast quarter of said section 20 to the United States, but said plaintiff

E. O. Miller did not make or execute said pretended abandonment for the purpose of avoiding the necessity of doing and performing the amount of actual labor or assessment work as required by the laws of the United States for the year 1896.

54 XXXIV.

On the 31st day of December, 1896, and about four hours before said pretended abandonment was filed in the office of the county recorder of the county of Fresno, State of California, the said plaintiff E. O. Miller, together with J. A. Hannah, W. F. Hall, D. G. Overall, Harry Levinson, Charles H. Smith, L. E. Hall, and R. B. Biddle located and claimed the northeast quarter of said section 20 as alleged in intervenor's complaint in intervention. That the said plaintiff E. O. Miller, W. G. Dozier, D. G. Overall and other persons did not locate or claim on said day or on any day the said southwest quarter of said section 20, and Harry Levinson, Charles H. Smith, L. E. Hall, Cora E. Miller, Myrtle Hall, J. E. Maxwell and W. G. Dozier, nor did any of said persons, locate and claim on said 31st day of December, 1896, the southeast quarter of said section 20 or any part thereof.

XXXV.

That the location and claim of the said northeast quarter of said section 20, *was* made by the said plaintiff E. O. Miller, J. A. Hannah, W. F. Hall, D. G. Overall, Harry Levinson, Charles H. Smith, L. B. Hall and R. B. Biddle were made in good faith by all of said parties and for the use and benefit of all of said parties and *was* not made at the instigation or request of said plaintiff E. O. Miller, nor for the sole use and benefit or use or benefit of said plaintiff E. O. Miller, nor was said claim and location of said
55 northeast quarter of section 20 made nor was any location made by said parties or any parties for the purpose of enabling the said E. O. Miller to acquire and hold or to acquire or hold a greater area of the mineral lands of the United States than the laws of the United States regulating the appropriation thereof permits an individual or an association of individuals to hold or acquire.

XXXVI.

That the said location made by the said plaintiff E. O. Miller, J. A. Hannah, W. F. Hall, D. G. Overall, Harry Levinson, Charles H. Smith, L. E. Hall, and R. B. Biddle on the said northeast quarter of said section 20 was not made in pursuance of nor in accordance with a conspiracy, or collusion or concerted design upon the part of said locators or any of them to secure and appropriate the said lands or to secure the title thereto by avoiding the requirements of the laws of the United States by any direct conflict or any conflict with or in opposition to the laws of the United States, and that said loca-

tion so made on said northeast quarter of said section 20 on December 21st, 1896, by said parties was not a re-location by the original locators, and was not made at a time when the land included therein was not open to exploration and location under the laws of the United States and of the State of California, and was not premature and invalid and of no force and effect, nor was the same premature
56 nor invalid and of no force or effect in favor of said locators or as against said intervenor, but said location was made in strict conformity to the requirements of the laws of the United States and of the laws of the State of California, and was made at a time when the land included therein was open to exploration and location under the said laws, and was valid and of full force and effect in favor of said locators and against said intervenor, and that the boundaries of the said claim and location involving the said northeast quarter of said section 20 were properly marked upon the ground and were marked in a manner so that the same could and can be readily and easily traced.

XXXVII.

That none of said locations or attempted locations made on December 31st, 1896, was contrary to the laws of the United States for the reason that said location was or is contiguous to other claims mentioned in said complaint in intervention; nor was the same an attempt to make and hold, in violation of the laws of the United States, a greater area of the mineral lands of the United States than is or was permitted to be appropriated either by an individual or an association of individuals.

XXXVIII.

That said plaintiff E. O. Miller did not at any time enter into a conspiracy and collusion and concerted design, or a conspiracy or collusion or concerted design with one George L. Dinely whereby
57 he the said E. O. Miller procured the said George L. Dinely to make a homestead entry upon the said northeast quarter of said section 20, in the United States land office in Visalia, California, on the 20th day of October, 1896, or at any other time or place; and the said E. O. Miller did not at any time whatever, in pursuance of any conspiracy, or collusion or concerted design, nor in furtherance of nor in pursuance of any design to secure title to said northeast quarter of said section 20, make application to the State of California to have the said northeast quarter of said section 20 selected as State indemnity land; nor did the said E. O. Miller at any time whatever, in furtherance of and in pursuance of his design to secure the title to said northeast quarter of said section 20 procure one Ernest L. Smith to make application to purchase the said land as such State indemnity selection, nor at any time whatever in pursuance or furtherance of any conspiracy, collusion, or concerted design whatever, or for the purpose of securing the title to said north-

east quarter secure the abandonment and relinquishment of the said State indemnity selection.

XXXIX.

That none of the acts upon the part of the said plaintiff E. O. Miller, or upon the part of any other person, as the same are set out and alleged in the intervenor's complaint in intervention, are or constitute any fraud against the intervenor or against the United States.

58 As conclusions of law from the foregoing facts, the court now hereby finds and decides

1. That the plaintiff E. O. Miller is the owner of all that piece and parcel of land situate in the county of Fresno, State of California, and particularly described in the complaint on file herein as against the defendants A. Y. Chrisman and H. T. Chrisman, and as against the intevenor J. W. Fewel, and as against all persons claiming or to claim said land or any part thereof, And that the said plaintiff Home Oil Company is the lessee of all of said piece and parcel of land under the title of the plaintiff E. O. Miller, and is entitled to the actual possession of said land and each and every part thereof as against the said defendants A. Y. Chrisman and H. T. Chrisman, or either of them, and as against the said intervenor J. W. Fewel.

2. That the said plaintiffs are entitled to a decree declaring and adjudging that neither of the said defendants A. Y. Chrisman and H. T. Chrisman nor the said intervenor J. W. Fewel has any estate, right, title or interest, or right of possession whatever in and to said land and premises or any part thereof, and forever enjoining and debarring the said defendants A. Y. Chrisman and H. T. Chrisman and the said intervenor J. W. Fewel from asserting any claim in or to said premises or any part thereof adverse to the said plaintiffs or either of them.

3. That the said plaintiffs are entitled to judgment for costs
59 accrued and disbursements made by said plaintiffs by reason of the answer of the said A. Y. Chrisman and H. T. Chrisman contesting plaintiffs' rights in said premises, to be taxed against the said defendants A. Y. Chrisman and H. T. Chrisman; and also a judgment for costs accrued and disbursements made by said plaintiffs by reason of the making and filing of the complaint in intervention herein, to be taxed against the intervenor J. W. Fewel, and judgment is hereby ordered to be entered accordingly.

Dated Fresno, June 24th, 1899.

J. R. WEBB,
Judge of the Superior Court of the County of Fresno, State of California.

(Endorsed:) Filed June 24, 1899. G. W. Cartwright, clerk.

Judgment.

(Title of Court and Cause.)

This cause came on regularly for trial on the 2nd day of May, 1899, M. M. Harris, Esq., L. L. Cory, Esq., F. H. Short, Esq., N. C. Coldwell, Esq., and J. A. Hannah, Esq. appearing as counsel for the plaintiff-, and W. R. McQuiddy, Esq., W. H. Metson, Esq., S. J. Hinds, Esq. and Messrs. Austin & Jones appearing as counsel for defendants A. Y. Chrisman and H. T. Chrisman, and W. S. Badger, Esq. and U. T. Clotfelter, Esq. appearing as counsel for J. W. Fewel, intervenor herein.

A trial by jury having been expressly waived by the counsel for the respective parties by stipulation made in open court and
60 entered upon the minutes, the cause was tried before the court sitting without a jury, whereupon evidence both oral and documentary was offered and introduced for and in behalf of the said plaintiffs, said defendants and of the said intervenor herein, and the evidence being closed the cause was submitted to the court for consideration and decision and after due deliberation thereof and being fully advised in the premises, the court delivers its finding and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and of the findings aforesaid, it is by the court ordered, adjudged and decreed, that the plaintiffs have judgment as prayed for in their complaint herein against the defendants and each and all of them, and that all adverse claims of the defendants and each of them, and all persons claiming or to claim said premises or any part *of* thereof through or under said defendants or either of them are hereby adjudged and decreed to be invalid and groundless, and that the plaintiff E. O. Miller, be and he is hereby declared and adjudged to be the true and lawful owner of the land described in the complaint and hereinafter described and every part and parcel thereof, and that his title thereto is adjudged to be quieted against all the claims, demands or pretensions of the said defendants or either of them, and that said defendants be and they hereby are perpetually estopped and enjoined
61 from setting up any claims to said premises or any part thereof, and that it is hereby further ordered, adjudged and decreed that the plaintiff Home Oil Company is the lessee of all of said lands and premises under the control of the said E. O. Miller and is entitled to the actual possession of said lands and premises and the whole thereof, and that all adverse claims of defendants and each of them and of all persons claiming or to claim said premises or any part thereof through or under said defendants or either of them are hereby adjudged and decreed to be invalid and groundless as against the possession and right of possession of the said plaintiff Home Oil Company, and that the said defendants and each of them

and all persons claiming or to claim through said defendants or either of them are hereby perpetually estopped from setting up any claim to said land and premises or any part thereof adverse to the possession and right of possession of the said plaintiff Home Oil Company.

And it is further hereby ordered, adjudged and decreed that the intervenor J. W. Fewel take nothing by his said complaint in intervention herein, and that all adverse claims of the said intervenor and all persons claiming or to claim said premises or any part thereof through said intervenor are hereby adjudged and decreed to be invalid and groundless, and that the plaintiff E. O. Miller be and he is hereby declared and adjudged to be the true and
62 lawful owner of the land described in said complaint in intervention and the whole thereof and hereinafter described, and every part and parcel thereof, and that his title thereto is hereby adjudged to be quieted against all claims, demands or pretensions of the said intervenor J. W. Fewel, and the said intervenor is hereby perpetually estopped from setting up any claims to said premises or any part thereof.

And it is further ordered, adjudged and decreed, that plaintiff Home Oil Company is the lessee of all the lands and real property mentioned and described in the complaint in intervention on file herein, and is entitled to the exclusive possession of all of said land and premises, and that the right and title and right of possession of the said Home Oil Company in and to said premises be and the same hereby are quieted against all claims, demands and pretensions of said intervenor J. W. Fewel, and of all persons claiming or to claim through him and the said intervenor and all persons claiming or to claim through him are hereby perpetually estopped and enjoined from setting up any claim to said premises or any part thereof adverse to the possession and right of possession of the said plaintiff Home Oil Company.

And it is hereby further ordered, adjudged and decreed that the plaintiff do have and recover against the defendants A. Y. Chrisman and H. T. Chrisman his costs herein taxed at — dollars, and that the said plaintiffs do have and recover their costs against the
63 said intervenor J. W. Fewel herein taxed at — dollars; that the land and premises whereof plaintiff E. O. Miller is adjudged and decreed to be the owner and his title thereto quieted as against the adverse claims of the defendants, A. Y. Chrisman and H. T. Chrisman, and whereof the said plaintiff Home Oil Company is adjudged and decreed to be the lessee and entitled to the possession are bounded and described as follows, to-wit: Commencing at a stake and pile of rocks placed at the quarter section corner on the northern boundary line of section 20, in township 19 south, range 15 east M. D. B. & M., thence running east on the section line 40 chains to the northeast corner of said section 20, thence running south, on the eastern line of said section 20, 40 chains to a stake at the quarter section corner, thence west 40 chains to the legal center of said section 20, thence

north 40 chains to the place of beginning, and being the northeast quarter of section 20, in township 19 south, range 15 east, M. D. B. & M. and situated in Fresno county, State of California. That the land and premises whereof plaintiff E. O. Miller is adjudged and decreed to be the owner and his title thereto quieted as against the adverse claims of the intervenor J. W. Fewel, and whereof said plaintiff Home Oil Company is adjudged and decreed to be the lessee and entitled to the possession are bounded and described as follows, to-
wit: the south half of the northwest quarter of the northeast
64 quarter of section 20, township 19 south, range 15 east, M. D. B. & M. and located in Fresno county, State of California.

Dated Fresno, June 24th, 1899.

J. R. WEBB,
Judge of the Superior Court of the County of Fresno, State of California.

(Endorsed:) Judgment. Filed June 24, 1899. G. W. Cartwright, clerk.

(Endorsed:) Judgment roll. Filed this 24th day of June, 1899. G. W. Cartwright, clerk, by A. D. Ewing, deputy clerk.

Minute Order.

(Title of Court and Cause.)

It is ordered by the court that the motion of application to the complaint in intervention be and the same is hereby denied. * * *

Minute Order.

(Title of Court and Cause.)

FRESNO, CALIFORNIA, *May 3rd*, 1899.

* * * It is ordered by the court that the order heretofore made herein, on yesterday, denying the motion and application of J. W. Fewel to file complaint in intervention herein be and the same is hereby vacated and set aside and it is further ordered that J. W. Fewel be and he is hereby allowed to intervene herein and
65 to file his complaint in intervention as of the 2nd day of May * * *

The defendants and intervenor by their counsel move the court for a non-suit, the cause is resisted by respective counsel for the plaintiff and after due consideration thereof the court ordered that the motion for non-suit be and it is hereby denied. * * *

Notice of Intention to Move for a New Trial—Defendants.

(Title of Court and Cause.)

To the above named plaintiffs and N. C. Coldwell, M. K. Harris, L. L. Cory, Frank H. Short, and J. A. Hannah, attorneys for said plaintiffs:

You and each of you will please take notice that the defendants, A. Y. Chrisman and Henry T. Chrisman, in the above entitled action, intend to move the above named court to set aside and vacate the decision of the court heretofore rendered, given and made herein, and to grant a new trial in the above entitled action, upon the following grounds:

1st. Accident and surprise which ordinary prudence could not have guarded against.

2d. Newly discovered evidence material for the defendants herein, which they could not with reasonable diligence have discovered and produced at the trial.

3d. Insufficiency of the evidence to justify the decision of the court in the above entitled cause.

4th. Errors in law occurring at the trial and excepted to by said defendants.

66 5th. That said decision of said court, in the above entitled action, is against law.

Said motion will be made for the causes mentioned in the first and second grounds above specified upon affidavits, and for the causes mentioned in the third, fourth and fifth grounds above specified upon a statement of the case, said affidavits and statement of the case, to be hereafter prepared and served upon you.

Dated July 8th, 1899.

W. R. McQUIDDY,
S. J. HINDS,
REDDY, CAMPBELL & METSON, AND
AUSTIN & JONES,
Attorneys for said Defendants.

Service of above notice of intention to move for a new trial is hereby admitted this 8th day of July, 1899.

N. C. COLDWELL,
L. L. CORY,
F. H. SHORT, AND
M. K. HARRIS,
Attorneys for Plaintiffs.

(Endorsed:) Filed July 8, 1899. G. W. Cartwright, clerk.

Notice of Intention to Move for a New Trial—Intervenor.

(Title of Court and Cause.)

To E. O. Miller and The Home Oil Company, the plaintiffs above named, and to M. K. Harris, N. C. Coldwell, L. L. Cory, Frank H. Short, and J. A. Hannah, attorneys for said plaintiffs:

67 You and each of you will please take notice that the intervenor, J. W. Fewal; above named, intends to move the above entitled court to vacate and set aside the decision and judgment of said court heretofore rendered, given, made and entered in the above entitled action, and to grant a new trial of said above entitled action, and said motion will be made upon the following grounds, to-wit:

I.

Accident and surprise which ordinary prudence could not have guarded against.

II.

Newly discovered evidence material for said intervenor, which he could not with reasonable diligence, have discovered and produced at the trial.

III.

Insufficiency of the evidence to justify the decision of the court in giving judgment for said plaintiffs and against said intervenor.

IV.

Insufficiency of the evidence to justify the decision and findings of fact filed in said cause.

V.

That said decision and judgment of the court is against law.

VI.

Errors in law occurring at the trial and excepted to by said intervenor,

68 Said motion will be made for the causes mentioned and set forth in the first and second above specified grounds, upon affidavits, to be hereafter prepared, served and filed herein, and for the causes mentioned and set forth in the third, fourth, fifth and

sixth above specified grounds, upon a statement of the case to be hereafter prepared, served, settled and filed herein.

Dated July 8th, 1899.

E. O. LARKINS &
U. T. CLOTFELTER AND
W. S. BADGER,
Attorneys for Intervenor.

Service and receipt of copy of foregoing notice of intention to move for new trial admitted this 8th day of July, 1899.

L. L. CORY,
N. C. COLDWELL,
F. H. SHORT,
M. K. HARRIS,
Attorneys for Plaintiffs.

(Endorsed:) Filed July 8, 1899. G. W. Cartwright, clerk.

69 In the Superior Court of the State of California in and for the County of Fresno.

E. O. MILLER and THE HOME OIL COMPANY (a Corporation), Plaintiffs,
vs.
A. Y. CHRISMAN and H. T. CHRISMAN ET AL., Defendants, and J. W. Fewel, Intervenor.

Statement on Motion for a New Trial.

Be it remembered that the above-entitled action came on for trial regularly on the 2nd day of May, 1899, before the court above named, sitting without a jury, a jury trial having been expressly waived by all the parties thereto; N. C. Coldwell, Esq., L. L. Corey, Esq., M. K. Harris, Esq., and F. H. Short, Esq., appeared as counsel for the said plaintiffs, and Austin & Jones, Esqs., S. J. Hinds, Esq., W. R. McQuiddy, Esq., and W. H. Metson, Esq., appeared as counsel for the said defendants A. Y. Chrisman and H. T. Chrisman, and E. O. Larkins, Esq., U. T. Clotfelter, Esq., and W. S. Badger, Esq., appeared as counsel for the intervenor, and all the parties hereto announced themselves ready for trial, and the following proceedings were had and the following evidence was given at the trial, to-wit:

70 Mr. COLDWELL: If the court please, we now offer in evidence location notice, dated December 31st, 1896, and filed for record January 5th, 1897, and recorded in vol. "K" of Mining Claims, at page 445, records of Fresno county, California.

(Objected to by defendant on the ground that the evidence offered is incompetent, irrelevant and immaterial. Objection overruled, to which defendant excepts.)

The offer is as follows:

"*Location Notice.*

"Notice is hereby given that the undersigned, in compliance with the requirements of the Revised Statutes of the United States, have this day located the following described placer mining ground, viz: Commencing at a stake and pile of rocks on which this notice is placed, at quarter section corner, on the northern boundary line of section 20, in township 19 S. range 15 E. M. D. B. & M.; thence running east on the section line 40 chains to the N. E. corner of said section 20; thence running south on the eastern line of said section 20, 40 chains to a stake at quarter section corner; thence west 40 chains to the legal center of said section 20; thence north 40 chains to place of beginning; being the northeast quarter of section 20, township 19 south, range 15 east, M. D. B. & M., and containing eight (8) mining claims of 20 acres each. To be hereafter subdivided according to law, situated in the county of Fresno, State of California.

This claim shall be known as the Visalia group of placer mining claims.

71 Located 31st day of December, 1896.

E. O. MILLER.
W. F. HALL.
L. E. HALL.
R. B. BIDDLE.
J. A. HANNAH.
D. G. OVERALL.
HARRY LEVINSON.
CHAS. H. SMITH.

Endorsed: Location notice N. E. 1–4 sec. 20, T. 19 S. R. 15 E. Dated Dec. 31, 1896. '90. Filed for record at the request of M. K. Harris, Jan. 5, A. D. 1897, 6 min. past 2 o'clock p. m., and recorded in vol. K of Mining Claims, page 445, Fresno county records. W. W. Machen, recorder, by Jno. La Blanc, deputy recorder. Marked Plaintiffs' Exhibit No. 1. Filed May 2nd, 1899. G. W. Cartwright, clerk, by J. S. Pugh, deputy."

E. O. MILLER, one of the plaintiffs sworn on behalf of plaintiffs, testified substantially as follows:

I am one of the plaintiffs in this case; I am, and since the year 1889 or '90, have been acquainted with the northeast quarter of section 20, township 19 south, range 15 east, M. D. B. & M., in Fresno county, California. The land is in the foothills of the Coast range of mountains and is rolling, grassy lands and bald hills; there are a few small rocks, not bigger than a water-bucket, I suppose, and no large rocks on it; there is likewise no brush on the land. You can stand on the east or west side and look practically over the whole

quarter section, thereby getting a good general view of the land; this is and has been the condition of the land ever since I have known it. I was on this land in the forenoon of the 31st of December, 1896. I went there the evening before—on the afternoon
72 of December 30th—in company with W. F. Hall; no other persons went there with us and we stopped at a house at Oil City and there met Captain Barrett, I. F. Poston, and a son of Poston called "Herb" Poston, and a man named Henage; and I think there was a man there named Barieau also. I do not think there was any other person except myself and Hall on this quarter section on the 31st. My purpose in going there was to make a mineral location upon that quarter section of land, and I communicated that intention to W. F. Hall. The first thing that I did that morning after breakfast, I started out quite early in the morning of December 31st, I asked either Capt. Barrett or Judge Poston——

Mr. McQUIDDY: We object to the witness making a statement in this manner in answer to a question of the attorney on the ground that he has not laid the proper foundation to introduce this testimony. It has not been shown here that this land was open to location on that day; it has not been shown that this witness or these men who were with him were competent, were qualified under the law to make such location, so it is incompetent, irrelevant and immaterial to prove any issue in this case.

(Objection. Overruled, defendant excepts.)

Assignment of Error No. 1.

I inquired either from Capt. Barrett or Judge Poston, or someone at the house, where the northwest corner of this quarter section was. They showed me from the house where we were, and I went
73 over there and found some rocks. I gathered up the rocks that were there and erected a rock monument. In the center of that rock pile I placed a stake about 2 feet long upon which there was a board about a foot long and 10 inches wide, and I tacked my location notice on that; that is at the northwest corner of this quarter section, the northwest corner of the northeast quarter.

(Document shown witness and identified by him as a copy of location notice so posted, which notice is dated December 31st, 1896, and purports to locate under the U. S. mining laws all of the northeast quarter of section 20, T. 19 S., R. 15 E. Mt. D. B. & M., claim to be known as the Visalia group of placer mining claims, bearing on its face as the locators the names of J. A. Hannah, E. O. Miller, W. F. Hall, D. G. Overall, L. E. Hall, Harry Levinson, R. B. Biddle and Charles H. Smith, and was filed for record at the request of M. K. Harris January 5, 1897, at 6:02 p. m., and recorded in vol. "K" of Mining Claims, page 445, Fresno county records, marked Plaintiff's Exhibit No. 1.)

After posting this notice on the northwest corner I went east one-half mile to the northeast corner of this quarter section; there I found what I thought was about the right place for a corner and I gathered up some rocks that were there in a pile, erected a rock monument in which I put a stake about 2 feet long and about an inch thick; the rock monument was about 18 inches high and in which I put a stake about two feet long. From that corner I went south half a mile to the southeast corner of this quarter section; there I found what I was satisfied had been a corner pre-
74 viously; I gathered up rocks that were there and I piled them and erected another rock monument about 18 inches high there. I did nothing else at this corner. From there I went west a little piece and then I went diagonally across the quarter section and went back over to the cabin at Oil City where I had stayed the night before. On the north line of this quarter section and on the east and a part of the way on the south line there were some stakes that had been previously put there, but I erected no intermediate monuments because these stakes were already there, marked the boundaries plainly and clearly; these intermediate stakes were pegs, probably five or six inches long, and some probably a foot long, and about 10 or 12 to the half mile. These small stakes were on the lines between the corners established by me. I made no survey of the land and had no surveyor with me, and they appeared to my eye to be on the line; and since that time I have taken a surveyor there and showed him to demonstrate whether or not the monuments I then erected were upon the Government subdivisions and corners. I took the surveyor of Fresno county and showed him the monuments that I erected, and he made a survey and verified it.

I know all of the parties whose names appear on the location notice very well, and all of their names were attached to the notice which I posted at the northwest corner (Plaintiffs' Exhibit 1). I placed them there myself; as for my authority to do so, before I went over there to make this mineral location I talked with W. F. Hall and Mr. Hannah and possibly with Mr. Overall, and they all sig-
75 nified their desire to make the location; as to the other people, Mr. Hall talked to them and made arrangements with them, I did not see them personally.

I am a citizen of the United States. born in the city of Visalia, in the State of California.

On the 31st of December, 1896, this quarter section was not in the possession of any one, and I considered it vacant. It was vacant. There was no one on the premises at the time I was there affixing these stakes. I think from the course I went going around the land and coming over it and the location that I had over at the house where I could have a full view of it, that if they had been there I would certainly have seen them.

In the year 1897 there was considerable work done upon this quarter section, and among other things there was an oil well com-

pleted during that year. I think the work commenced some time in the summer of 1897. There were also some roads built, a derrick erected, oil well casing purchased, a well drilled about 700 feet deep and completed, which yielded and flowed oil during that year; *the value of* work done in 1897 was from $3,000 to $6,000. All of this work was done by the Home Oil Company as my lessees. During the year 1898, the Home Oil Company, as my lessees, bored and completed two oil wells, one about one thousand feet deep, the other between thirteen and fourteen hundred feet deep, erected the necessary derricks, and built more road over to the point of the quarter section where they were to drill these new wells, so that they could haul their machinery and lumber there. These wells
76 were bored and were both successful wells and are now flowing oil. Besides doing other work of the probable value of $20,000 or more. I put the Home Oil Company in possession of that property.

(Document shown witness and identified as a lease from witness to Frank Barrett, dated September 17th, 1897, covering the northeast quarter of section 20, twp. 19 S. R. 15 E. Mt. D. B. &. M., for the period of 10 years, executed by E. O. Miller and Frank Barrett, acknowledged by both parties. Endorsed thereon is an assignment of Frank Barrett to the Home Oil Co., of all his rights therein, executed on the 17th day of September, 1897, which assignment was duly acknowledged. Marked Plaintiffs' Exhibit 2.)

(The foregoing offered in evidence by plaintiff and its introduction objected to on the grounds that the same is immaterial, irrelevant and incompetent, and that the proper foundation has not been laid for its introduction. Objection overruled. Exception.)

Assignment of Error No. 2.

Cross-examination:

Defendants move the court for an order to strike out Plaintiffs' Exhibit 1 on the grounds that the document introduced is not the original and that no reason has been shown why the original has not been produced. Motion is denied and exception.

Assignment of Error No. 3.

The WITNESS: When I went on the land on the 31st of December I had the notices of location already prepared; my recol-
77 lection is that I prepared them in my office in Visalia before I left home. At the same time I prepared notices to file upon the southeast quarter of this same section, and at the same time I prepared notices to be posted on the southwest quarter of the same section. I don't remember all of the names on the notice posted on

the southeast quarter; part of them were the same as part of those people on the northeast quarter.

I think I have been over this land 10 or 12 or 15 times, but only once prior to the 31st day of December, 1896.

I have not a deed in my possession made by Frank Barrett, J. J. Bright, James L. McLean, James A. McClurg and others to the Producers' Oil Company; I have a deed from the Producers' and Consumers' Oil Company to myself.

"This indenture made this 24th day of December, A. D. 1896, between the Producers' and Consumers' Oil Company, a corporation organized and doing business under the laws of the State of California, and having its principal place of business at the city of Fresno, the party of the first part, and E. O. Miller, of Tulare county, State of California, the party of the second part:

Witnesseth: That the said party of the first part for and in consideration of the sum of ten dollars, gold coin of the United States of America, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has remised, released and quitclaimed, and by these presents does remise, release and quitclaim unto the said party of the second part and to his
78 heirs and assigns forever, all those certain lots, pieces or parcels of land situate, lying and being in the county of Fresno, State of California, and bounded and particularly described as follows, to-wit: the south half of the northeast quarter of section twenty, township nineteen south, of range fifteen east, M. D. B. & M.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever.

In witness whereof, the said party of the second part, by its president and secretary thereunto duly authorized, has hereunto set its hand and seal the day and year first above written.

THE PRODUCERS' & CONSUMERS' OIL COMPANY,

[SEAL.] By I. E. POSTON, *President*,
By K. W. BROWN, *Secretary*.

STATE OF CALIFORNIA, } ss:
County of Fresno, }

On this 24th day of December, 1896, before me, M. K. Harris, a notary public, personally appeared I. F. Poston, known to me to be the president, and K. W. Brown, known to me to be the secretary,

of the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

Witness my hand and seal.

79 [SEAL.] *M. K. HARRIS,*
Notary Public in and for the County of Fresno,
State of California.

Endorsed: 7638. Deed. Producers' and Consumers' Oil Co., to E. O. Miller. Dated Dec. 24, 1896. Filed for record at the request of M. K. Harris Dec. 31, A. D. 1896, at 2 min. past 3 o'clock p. m. and recorded in vol. 182 of Deeds, page 410. Records of Fresno county, Cal. W. W. Machen, recorder, by Jno. La Blanc, deputy recorder. Marked Defendants' Exhibit No. 1."

The following document was shown witness, identified, offered and read in evidence, viz:

"Know all men by these presents, that I, E. O. Miller, grantee of "the locators of the placer mining claims upon the south half and "northeast quarter of section 20, township 19 south, range 15 east, "M. D. B. & M., in Fresno county, State of California, do hereby "release, abandon and reconvey unto the United States of America, "all right in and to said land acquired under and by virtue of the "location made by any of my grantors as placer mining claims "under the mining laws of the United States, and particularly "under sections No. 2329, No. 2330 and No. 2331 of the Revised "Statutes of the United States.

"Witness, my hand this 29th day of December, 1896.

"(Signed) E. O. MILLER. [SEAL.]

Acknowledged December 29th, 1896, and recorded December 31, 1896, at 4 minutes past 3 o'clock p. m. in vol. "K" of Mining Claims, page 431, Fresno county records.

80 The WITNESS: The occasion of my getting this deed from the Producers' and Consumers' Oil Company was, there was a man named Hall—the Producers' and Consumers' Oil Company had some flowing oil wells on the northwest quarter of section 20. About the month of August, 1896, the Secretary of the Interior decided that oil was not a mineral and could not be located under the mining laws of the United States, an acquaintance of mine by the name of L. E. Hall filed a homestead on the northwest quarter of section 20, upon which the oil wells of the Producers' and Consumers' Oil Company were located. I was acting as attorney for Mr. Hall. Captain Barrett and Judge Harris, representing the Producers' and Consumers' Oil Company, came to Visalia to see me for the purpose of getting Hall to relinquish his homestead on the quarter section that the oil wells were on and give it back to them, and they offered me at that time that if I would give them the

quarter that they were developing, or get Hall, rather, to relinquish that quarter, give them that relinquishment, that they would make a quitclaim deed to the rest of that section, which was then open, unoccupied ground, and which they were not operating. I undertook the proposition to secure the abandonment for them and gave it to them and Hall relinquished his homestead and this quitclaim deed was made to me as a consideration for those services.

I knew that the Producers' and Consumers' Oil Company asserted some claim to the balance of the section, and that they had
81 pretended by the records to make a location there some time in 1896, but I never knew that a valid location was made—certain physical acts are necessary to constitute a valid location. I did not know that any location was in fact made by Barrett and others in 1895, notwithstanding the fact that he made this quitclaim deed to me.

My reason for making the instrument of abandonment (Defendants' Exhibit 2) was that I became convinced that the Producers' and Consumers' Oil Company had abandoned the land; the original locators, if ever they did in fact locate it, made quitclaim deeds to the Producers' and Consumers' Company. The Producers' and Consumers' Company would make nothing by a quitclaim deed to me and delivered me the possession of the land. I was advised—I believe then as I still believe that these conveyances operated simply as an abandonment, they surrendered me the possession and made a quitclaim deed. The abandonment was to me from the Producers' and Consumers' Oil Company. The quitclaim deed I construed as nothing more than an abandonment, regarded it as such. I abandoned to the United States whatever there might be, I wanted to make it clear so there would be no question, I wanted to go as far as I could if they did happen to have any possible right, I wanted to clean it up. I didn't think they had, but my purpose was, if any existed, to revest the title in the Government of the United States so that I could make—so the land would unquestionably be open to location December 31, 1896, myself and my colocators could make a valid mineral location.

82 Q. Didn't you believe on the 31st day of December, 1896, that this land, being oil land, was not subject to location as mineral land?

A. I didn't know. The Secretary had decided on August 27, 1896, that it couldn't be located as mineral land, but I knew that a motion for a revision had been filed in the case and there was strong hopes entertained that the decision might be reversed, as it was afterwards; so I wanted to play both ends of the proposition to be safe.

Q. Well, did you not, yourself, on or about the 15th day of December, 1896, make application to the surveyor-general of the State to purchase the south half of this section for school land?

A. I did.

Q. And request him to make a State selection of it for that purpose?

A. I did. I also prepared the application of Ernest L. Smith to purchase from the State the northeast quarter of section 20, and acted as his attorney in the matter. At the time I put up my notice there was not a stake at the northwest corner. I did not find any stake at the northeast corner of the section, nor at the southeast corner. I put a stake at the northeast corner and made a rock pile at the southeast corner, but put no stake there.

Last Saturday I had these lines surveyed. They had not been surveyed prior to that time since my location was made.

I didn't know at the time of making the location whether or not there were any stakes on the west line because I didn't go over the west line, but I have been there since and I know that there
83 are stakes there. I am satisfied they were put there at the same time those other stakes were because they have the same appearance as to age. They are about the same size, and have all the appearance of being put there about the same time and in the same manner. I never employed anyone to put these stakes upon those lines.

Q. Did you ever make any discovery of oil upon that particular quarter section?

A. I did, through my lessees, the Home Oil Company.

Q. Well, did you prior to the 31st day of December, 1896?

A. I can't say that I did.

Prior to making this location I talked with Mr. Hannah and W. F. Hall, and possibly with Mr. Overall. There was no arrangement between us three in regard to making these locations except that we would go over there and locate this ground for mining purposes. I don't know that there was any specific arrangement about going ahead to develop or to bore for oil, but it was understood that we were to take it for the purpose—for mining ground for the purpose of developing, there were no details entered into at that time. I never talked with Charles H. Smith, L. E. Hall or R. B. Biddle about the matter, nor had any arrangement with them; but, as I told you, I might possibly have talked with Mr. Overall.

My best judgment is that there is no oil well on the south half of the south half of the northeast quarter, the land claimed by A. Y. Chrisman and H. T. Chrisman.

The road that goes up to Oil City, my recollection is, comes
84 along about like this (pointing on diagram of northeast quarter of section 20); that is only my best judgment. The first well bored on the northeast quarter was right there; but the first road that was built, I understand, was built right in here in a little run across here (pointing on diagram to place near northwest corner of northeast quarter of section 20). Captain Barrett built that in 1896 and erected a derrick here in December, 1896, right here that was never used. It was there December 31st, 1896, when I made this location; the derrick was there and the road was there; I didn't see Captain Barrett build it; it was there, and he told me he built it or had it built. The remains are still there; it was blown

down, and the timbers in that derrick are lying on the ground today—were last Saturday. There was no well bored at that derrick. When I took the deed from the Producers' and Consumers' Oil Company I considered that it operated simply as an abandonment, surrender of possession on the part of the company. I didn't consider that they had any title to convey; I didn't consider they got any title from the original locators, as I explained to you a while ago, for the reason that the locators had made quitclaim deeds. I considered that deed simply as an abandonment of their location on that and a surrender of possession; I understand they abandoned it.

The first well was an oil-producing well. The Home Oil Company subsequently built some roads to those derricks where they have the other oil wells. Of course, before they can start in to erect a derrick they have to have a road graded so they can get
85 timbers up to where they want to construct it. The construction of the road was a necessary part of the development. They built a road to every well. There are three oil-producing wells on that quarter section.

I have a deed in my possession made by these locators in this location notice that was made on December 31st, 1896, to me. (Deed produced.) This is the deed from the locators on December 31st, 1896, to me on the northeast quarter of section 20. Deed dated July 31, 1897, from J. A. Hannah, W. F. Hall, D. G. Overall, Harry Levinson, Charles H. Smith, L. E. Hall and R. B. Biddle to E. O. Miller, consideration $10; grant, bargain, sell, convey and confirm, commencing at a stake and pile of rocks at the quarter section corner of the northern boundary line of section twenty in township nineteen south, range fifteen east, M. D. B. & M., thence running east on the section line forty chains to the northeast corner of said section twenty; thence running south on the eastern line of said section twenty forty chains to a stake at quarter section corner; thence west forty chains to the legal center of said section twenty; thence north forty chains to the place of beginning—the northeast quarter of section 20, T. 19 S., R. 15 E. Mt. D. B. & M., in Fresno county, California, and being known as the "Visalia" group of placer mining claims, which mining claims were located by us under the laws of the United States on the 31st day of December, 1896, and a copy of which location notice was recorded in the recorder's office of Fresno county, State of California,
on January 5th, 1897, in Book K of Mining Claims, at page
86 445, records of Fresno county, California. Acknowledged by grantors and filed for record at the request of E. O. Miller October 22nd, 1897, and recorded in vol. "7" of Transfers of Mining Claims, page 135, Fresno county records.

My recollection is that this deed was made on the date it purports to have been made. The consideration expressed in the deed is not the real consideration. Some of them got a good deal more than $10. I paid J. A. Hannah no money consideration; he is my part-

ner; he is equally interested with me in this property, and the conveyance was made to me so that I could conveniently transact the business, and he still owns a half interest with me; he has no written contract. W. F. Hall owns 7–20 of this property now, and I hold it in trust for him to that extent. I paid Hall no money; he does not hold my deed. I gave him a written instrument, however, that shows the nature of his interest.

(Adjournment until 9 a. m. May 3, 1899.)

The COURT: Gentlemen, on hunting up that matter of the right of intervention, and looking into the authorities last night, I have come to the conclusion that my ruling in the matter was perhaps wrong, and that this morning I think I will allow you to file the complaint in intervention the same as if it had been filed yesterday. I will reverse my ruling and let him file it. File your answer when the trial is through with, and consider it as filed now. You may take leave now to file your answer; consider it filed and prepare it and file it at your leisure.

87 (Continuation of cross-examination of the witness E. O. MILLER:)

I think I made that instrument (referring to contract with Hall) some time in the fall of 1897. The consideration mentioned in that instrument was the only consideration which passed between me and Hall; that instrument represents the true consideration. I am not related to Mr. Hall in any way. Mr. Hannah is my brother-in-law, his wife being my sister.

Q. Now, what consideration, if any, passed from you to Harry Levinson for his making this deed?

A. I had no personal arrangement with Harry Levinson; I gave W. F. Hall $100 to pay to Mr. Levinson. I do not know whether that money was ever paid to Mr. Levinson. Mr. Levinson is not related to me.

Q. Now, what consideration, if any, passed from you to L. E. Hall for the making of this deed to you?

A. I gave W. F. Hall $100 to pay to L. E. Hall.

I made no arrangements with L. E. Hall; I had never seen him and agreed with him as to what he should receive. Those arrangements were made by W. F. Hall, or, rather, by me through W. F. Hall. I understand W. F. Hall and L. E. Hall are brothers. I do not know that W. F. Hall paid this money to L. E. Hall, only what he told me.

Q. Well, what consideration now, passed from you to D. G. Overall for his making this deed?

A. None; that was arranged for by W. F. Hall as part of the consideration for me executing this agreement to Hall.

88 Q. Now, did any consideration pass from you to R. B. Biddle for his making this deed?

A. I gave W. F. Hall $100 to pay R. B. Biddle; I do not know of my own knowledge that Hall paid that money, or any part of it, to Biddle.

I remember distinctly the 30th day of December, 1896. It rained in the morning—it rained between 1 o'clock and 3, because I know Mr. Hall and myself got wet going from Coalinga to the oil wells. It rained a little in the fore part of the afternoon at the oil wells and then quit. The character of the surface of the soil there about Oil City is not what I would call sandy; it is more of a clay formation; some small rocks on the hills. There are bald hills on which grass grows in the spring. There is some adobe there; when this soil is wet—I found it to be quite sticky on the 30th because I walked out and the mud would stick to my boots and I would have to scrape it off before walking in the house; each house is provided with an iron rod so you can scrape your feet before you go in the house. When I went up to the northwest corner (of the northeast quarter) on the morning of the 31st, the soil stuck to my feet some but not enough to impede my walking around conveniently, because the sun was shining next morning and it was clear and bright and it had dried up some.

The derrick that I spoke of on this northeast quarter was south and east from the corner where I posted the notice, about 150 or 200 yards in a little run; the northeast corner of section 20 is just east of a rather deep gully that runs northeast and southwest. It
89 is situated on flat land, from which you can look all over almost the entire country around there.

I had never been to the northeast corner of section 20 before that time that I went there on the 31st of December, 1896. When I was at the southeast corner of the northeast quarter of section 20 on the 31st of December, 1896, I did not find any other stake at that corner. I did not see any stake on that day with a notice tacked on it, stake with a board on the end of it with a notice tacked on it. I am positive I saw no such notice there. I think if it had been there within 10 or 15 or 20 feet I would have seen it. I did not put a stake in that corner. I did not find that corner marked at the time I went there. I found a pile of rock there which I told you I re-erected and built up higher. These rocks were laying all within a space of 2 or 3 feet square, some of them might have been on top of the others. I took them and piled them higher; put them up on top of each other and made a pile of rocks.

What I have stated in regard to what I did that day was all that I ever did about marking the boundaries of that quarter section after putting up my notice.

I gave Hall $100 to pay to Charles H. Smith.

Q. Had you made any arrangements with Mr. Smith about the transfer of this property or his interest in it?

A. The arrangement was attended to by Mr. Hall. I never said anything to Mr. Smith about buying him out.

Re-direct examination:

Before I made this location I talked to Mr. Hall about my intention to do so, and I think I talked to Mr. Hannah. I don't
90 think I talked to any one of my co-locators with reference to locating the quarter section with the exception of Mr. W. F. Hall, Mr. Hannah and possibly D. G. Overall. The way I came to put the other names in the locations, Mr. Hall came to me and told me that he had seen them and they were friends of his and they would like to go on the location with us.

As to the work done upon that place, before I made my location on December 31st, 1896, I saw an oil well derrick and I saw some road built up to the derrick. That road connected with the road at or near Oil City, where they bring the machinery up, and went to the derrick. It was probably three or four hundred yards. It was a dirt road, graded like they build roads over there. A derrick was erected there when I was there on December 31st, and had been previously erected.

My attention was specially called to the fact that the deed from the original locators to the Producers' and Consumers' Oil Company, and also the deed from that company to myself, were quitclaim deeds and not grant deeds, shortly after we received it from the Producers' and Consumers' Company. A very few days before I made these locations of December 31st. This abandonment was prepared at Visalia on December 29th, 1896. I sent it to Fresno to Judge Harris to have it recorded; I mailed it to him I think on the night of the 29th, just before I started to Coalinga, where I got next day. The execution of this abandonment and the sending of the abandonment to Judge Harris was preparatory to my mak-
91 ing the location of December 31st, and it was a part of the same transaction.

I knew the president of the Producers' and Consumers' Oil Company, I. F. Poston, and the secretary, K. W. Brown, and the vice-president and manager, Frank Barrett. These gentlemen knew that I was in possession of that property. I think they knew that I had made a lease of the property because they were interested in the company that leased it from me.

As to the knowledge of the work done upon this property, under my lease Capt. Barrett had been there. I have been there in the oil fields with him three or four or five times since the Home Oil Company have been operating. He has been around the wells and seen the derricks. I have been there with Judge Poston half a dozen times. He has seen the wells where they drilled them. They have met and talked about it; been on the land together. Karl Brown has been there right on the quarter section where the wells were being drilled. Since the execution of the deed by the Producers' and Consumers' Oil Company to me they have never to my knowledge done any work upon that quarter section. They have never protested against me or my lessees doing any work on that quarter,

and never to my knowledge have they claimed any possession or right of possession of that quarter section since the execution of those deeds; they have never claimed it to me.

Q. Or to anybody to your knowledge. Now, then, have they ever been in possession of this quarter section, of any part of it,
92 since the execution of this deed to you?

Mr. McQuiddy: If the court please, we are willing to admit that the Producers' and Consumers' Oil Company and the original locators who passed whatever title they may have had to this land to Mr. Miller by these instruments which are now part of the record in this case, have never, since the 1st day of January, 1897, had anything to do with the land or been in possession of it since the 1st day of January, 1897.

Mr. Coldwell: The proposition is whether or not, since the execution of the deed to Miller, they have had anything to do with it—execution of the deed by the Producers' and Consumers'——

Mr. McQuiddy: Yes, we will admit that the Producers' and Consumers' Oil Company, as a company, and its agents and employés, and that the original locators who passed whatever title they may have had to this land to the Producers' Oil Company, none of them have done anything on the land or had anything to do with it since the 24th day of December, 1896, that is, the date of the deed of the Producers' Oil Company to Mr. Miller.

Mr. Coldwell: That is not the proposition.

Mr. Short: That they abandoned whatever rights they may have had to Mr. Miller.

Mr. Coldwell: That is the proposition we want.

The Witness: No one ever made any objection to my possession or my lease to the company, or to my development of it.
93 I am an attorney-at-law, and have been practicing about six or seven years.

J. A. Hannah, sworn for plaintiff-, testified in substance as follows:

I am the J. A. Hannah that is mentioned in the testimony of Mr. Miller; I am an attorney-at-law; I am and at all times mentioned by Mr. Miller in his testimony, was a citizen of the United States.

George L. Hoxie, sworn for plaintiffs, testified in substance as follows:

I am county surveyor of the county of Fresno. I know the northeast quarter of section 20, T. 19 S., R. 15 E.; I was over on that quarter section in March, 1897; I was there the last time on last Saturday, that would be April 29th I think; I was there in company with E. O. Miller, W. F. Hall and Mr. Sanford. Mr. Miller went around over the ground with me and showed me points that he had previously visited. We first went to the mound of rocks across the

ravines from Oil City a short distance, and then up over the hill in an easterly direction, following the line of stakes that was quite plain, to a point that he said was the northeast corner of the section, and thence southerly following the line of stakes to another point that he said was the southeast corner of the northeast quarter and then we went directly to Oil City. The next morning I was shown a stake that was purported to be the southwest corner of the northeast quarter, by Mr. Hall. When we went to the northwest
94 corner of the northeast quarter, Mr. Miller told me that that was where he had posted a notice of location some time previous. And the next morning I went to work to ascertain the position of the monuments, and found them to be the true corners of the northeast quarter of sec. 20, T. 19 S., R. 15 E.

Q. What, if anything, did you find, now, upon the ground between those two corners?

A. It was plainly staked all the way along, and there were rock mounds—I found a number of monuments of the survey that had been made by one Mr. Finley in January, 1896, with his initials; stone monuments with his initials cut in the stone.

Q. Now, then, calling your attention to this pile of rocks, which he had stated to you was the southeast corner as established by him, what did you find that to be?

A. The stakes lead directly to a point both from the west and the north to this corner, and there was a redwood stake there. There had been a well dug and the excavations had covered over any other monuments that might be there. At the southwest corner to which my attention was called by Hall, I found an Oregon pine stake, 3 by 3. It was the same stake as described in Finley's survey, and there was also a mound of rocks there, just a little northeast of the stake, about 3 links. The rocks had been there evidently some time. On the line between the southeast corner and the southwest corner I found two rock monuments of Mr. Finley's with his marks on them, with the correct distance, and I found stakes about an inch and a half square that had evidently been there a long time. I should think there were perhaps three or four of
95 that size, and quite a number of smaller stakes. I platted that ground and have the plat in my possession here. It shows the monuments that I found on the ground, and also shows the oil wells between the west line of the quarter and the oil house, and a road that I crossed, two roads, and some of the ravines. I made an accurate measurement of the west and south line, not of the north and east line, and this plat is made from my notes and is correct. (The map is here offered and admitted in evidence.)

(Insert Plaintiffs' Exhibit III, plat of N. E. ¼ sec. 20, T. 19 S., R. 15 E.)

(Here follows diagram marked p. 95*a*.)

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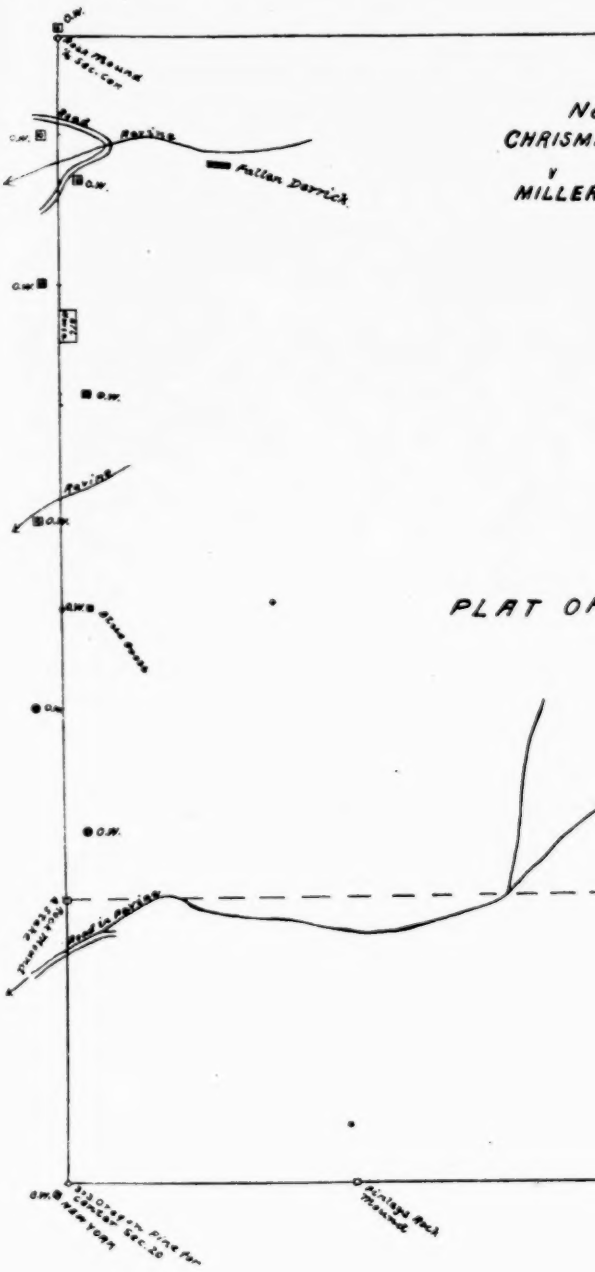
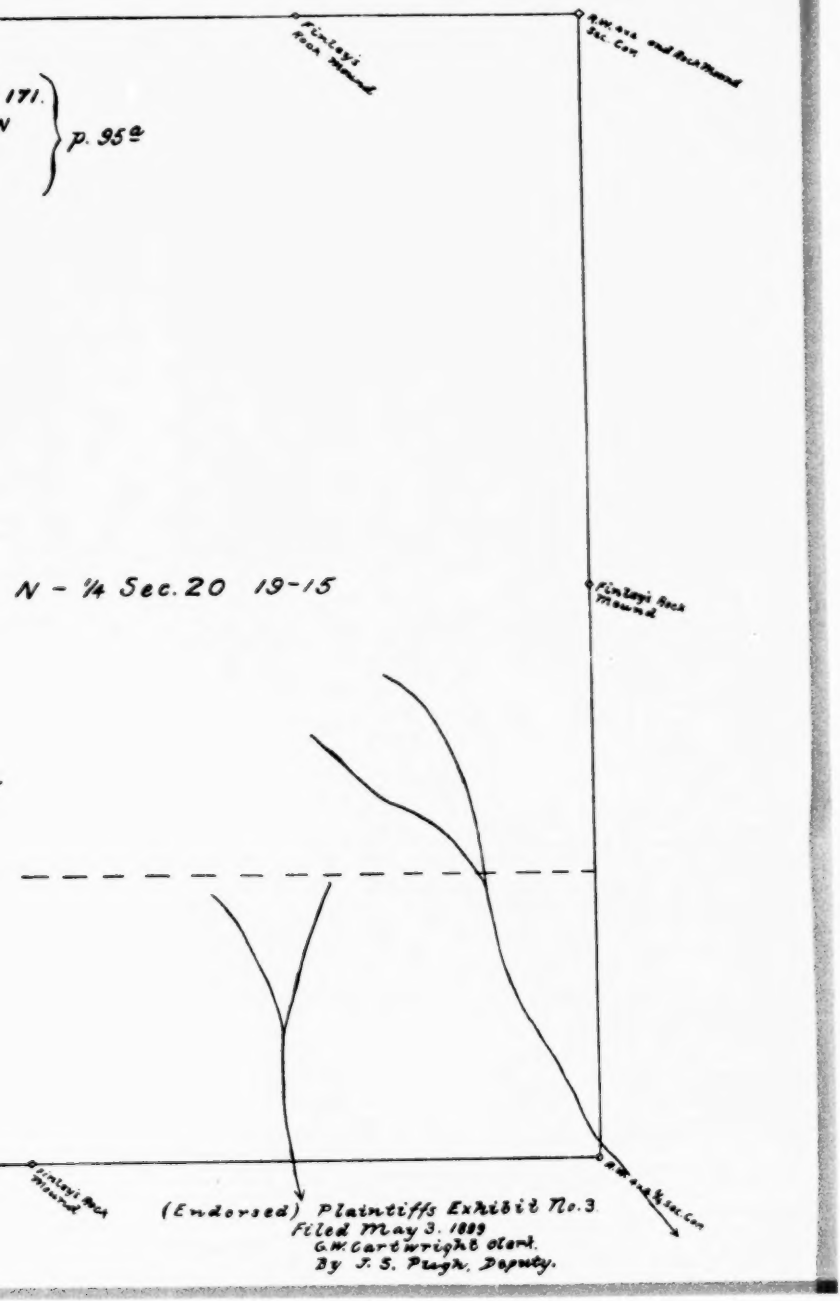



171.
p. 95
N - 1/4 Sec. 20 19-15
(Endorsed) Plaintiffs Exhibit No. 3
Filed May 3. 1889
G.W. Cartwright clerk.
By J. S. Pugh, Deputy.

The letters "O. W." upon the map are intended to represent oil wells, the position of the oil wells that I found upon the quarter section. The words "fallen derrick" near a mark upon this plat is intended to represent the approximate position of the debris that I saw from the derrick—the lumber broken and scattered there.

Cross-examination:

Q. In making these surveys did you use any chain or tape or any instrument for making accurote measurements?

A. I did, sir.

WITNESS (continuing): The character of the ground along the north line of this particular quarter section is quite rough, not so but what it could be accurately chained though. From the north corner of the quarter for about 15 or 20 chains it is not difficult; then you go down into a deep gorge and out again, steep up to a point about 10 or 12 chains west of the northeast corner of the section. Then it is quite smooth again. In other words, you
96 cross one pretty rough ravine on the line. I did not chain that end of it. I found a monument of Mr. Finley's there. I found a monument of Mr. Finley's ten chains east of the northwest corner of the quarter, and I found one ten chains west of the northeast corner of the quarter. These were stone monuments marked with his initials, and representing the numbers of the lots they designated. I commenced my survey at the north quarter corner on the north side of 20. I knew that was the northwest corner of the northeast quarter, because I had occasion to survey a road to Oil City in 1897, and investigated then as to the position of that corner. There was no stake there the last time I was over there. There was a pile of rocks. When I was there in 1897 locating this road, there was a stake and there was a notice, or rather more than one notice at that corner. I paid no attention to them because I was not looking for notices. The character of the land between the northeast corner of the section and the quarter section line south of that, you ascend rather gradually up to the top of the hill. On the top of that hill you have a commanding view of everything below, and then go down that hill quite an incline for a way into a ravine, and there you find the other corner. I have not indicated on this plat all the gullies or gorges I have spoken of. There was a mound of rocks about 40 rods north of the southeast corner of the quarter section (referring to plat). I have drawn a line across here about that distance from the south line of the quarter section which is intended to represent the north half of the south half of the quarter section, north line of the south half of the
97 south half of the northeast quarter, that would be of the two south 20's of that quarter section. There was nothing on that line to identify it last Saturday. I traced that line there. I went to the corner—Mr. Finley had a corner there 20 chains west of the southeast corner of the quarter—and run north 10 chains

and a fraction according to Mr. Finley's notes, although Mr. Finley had never placed a corner at that point. It was simply a corner of these mining claims that I was asked to look for the corner of and found my corner. No line was marked there at all. The only evidence of any corner at that point was a little bit of stake about as big as my finger that was not on the line but was somewhere close about where the corner might or should be to the two twenties. The point would be on the side of the hill, and there was no evidence of any corner there at all. The lumber of the old derrick on that quarter which I have described looked as though it was old lumber and might have been there for several years.

Standing at the northwest corner of the quarter section I could not see my stake or any monument at the northeast corner of the section, because there were hills between, and the corner of the section is just over a little ridge and you can't see it till you get close to it. Standing at the northeast corner you cannot see the southeast corner of the quarter section, there is a hill between the two corners. Standing at the southeast corner and looking west you cannot see the southwest corner or middle of the section because the southeast corner is down in a ravine. Standing at the southwest corner of the northeast quarter, or center of the section, you cannot see the northwest corner of the quarter section; there is a rise, higher ground, between. The corner at the center of the section is in a depression. I have a copy of the Finley plat on file in the recorder's office. This is a plot of the whole section. (Here copy of plat is placed in evidence by defendant, marked Defendant's Exhibit No. 5.)

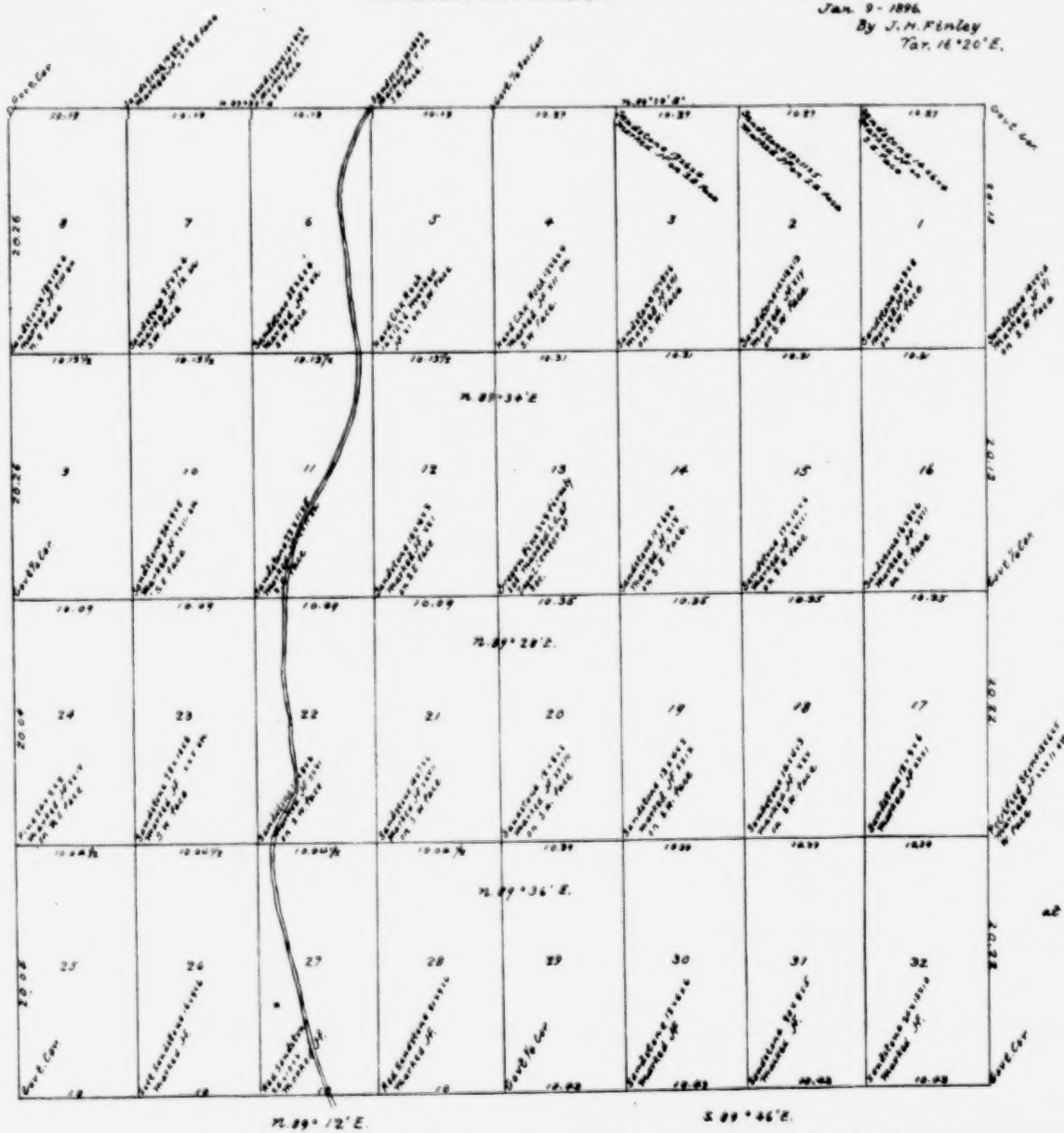
98

(Here insert copy of said plat.)

(Here follows diagram marked p. 98a.)

Sec. 20 19 - 15

Subdivided into 20 acre lots for Producers & Consumers Oil Co.
Jan. 9 - 1896.
By J. H. Finley
Var. 16° 20' E.



Note. Interior Corners set by Measurements East & West and not by intersection.
No interior North or South lines run. Chain measure or astronomic.

Survey No 56

Plat of Section 20 T 19 S. R. 15 E. M. D. B. & M.
Subdivided into 20 Acre Lots for the
Producers & Consumers Oil Company (Incorporated)
Survey Completed January 9th 1896.
By J. H. Finley Licensed Surveyor
Selma Cal.

(Endorsed) Defendants Exhibit No. 5
Filed May 3 1897
O. M. Cartwright clerk
By J. S. Hyde Deputy

(Record of Survey Fresno Co.)

Ro 171
Chrisman
to
Miller

Filed Mch. 5th 1896
at request of Frank Barrett

The witness, continuing in answer to question of the court, said: At each one of the corners around the quarter I found a monument marking them.

W. F. HALL, sworn for plaintiffs, testified in substance as follows: I am a native born citizen of the United States, of the age of 41 years, and am the same W. F. Hall named as one of the locators of the northeast quarter of section 20, T. 19 S., R. 15 E. I am acquainted with that quarter section and was on a portion of it on the 31st of December, 1896. Part of the time E. O. Miller was with me and part of the time a man named Paul Haunfeldt was with me. I was there in the forenoon of the 31st between seven and eleven or half past eleven. While I was there I put up a monument on the southwest corner of this same northeast quarter—a stake.

Q. At what point?

Mr. McQUIDDY: At this point we object to the testimony of this witness on the ground that it is irrelevant, incompetent and
99 immaterial to prove any of the issues of this case, for the reason that the plaintiffs allege in their complaint that they are the owners of the land; they do not allege at all they have derived it through any of the statutory provisions of the laws of the United States, or the laws of the State of California. Therefore it is incompetent at this time to prove any mineral locations.

Objection overruled and exception.

Assignment of Error No. 4.

A. I erected it at the southwest corner of the northeast quarter, which is the center of the section; I put up a rock monument there probably eighteen inches high; a pile of rocks built up out of small rocks, and put a stake up there. My intention in making that monument—my idea was to make a mineral location on that quarter section in connection with E. O. Miller, the plaintiff in this case, and the other parties named as locators on that notice. I am acquainted with those persons. Prior to the time I erected this monument I had talked the matter over with them; it was an agreement that land should be located. I don't know that I could repeat just exactly the conversation that took place, but the purport of it was that I had gone to those friends of mine—they were all friends of mine—and told them that I wanted to be in—wanted to locate some land over there, and I wanted to know if they wanted me to locate them—told them what the conditions were, and they did, they said they did. That was practically what was done, that
100 they wanted to be located with me on the land. Mr. Miller went over there with me. (Paper handed to witness.) I think that is the notice I refer to. On December 30th and 31st, 1896, when I was there—all these parties resided at Visalia where I resided at the time—I did not find any one in possession or any evidence upon the ground or in the vicinity of anyone being in

possession of this northeast quarter. I was there on the 29th of April, 1899, with Geo. L. Hoxie, the surveyor, and Mr. Miller, and another gentleman called Sandy. I went to one corner that I had originally put a monument on and waited for Mr. Hoxie to come; I went and stood there. He chained up to us. It was the center of the section. After Mr. Hoxie chained up to it I said "This is the monument I put up there."

Cross-examination:

I was on that land prior to the 30th of December, 1896. I don't think I could tell the month; I was there frequently, was interested over there, and Mr. Lavelle and myself were interested in a gypsum proposition there. The gypsum claims were not on the northeast quarter of 20, but we thought it was at that time, but found out afterwards it was on 21. At that time I knew where part of the quarter section corners of this northeast quarter were. I had been to the center of the section prior to my going there. There was a stake there at the center, and a stake was there on the 31st of December, 1896. I spoke to the parties named on the notice of location about making location. I think I told Harry Levinson that I was going to file on the northeast quarter and that I wanted to use his name as a locator on that quarter. As to the conversation exactly, I don't remember.

101

Q. Well, now, I will ask you, when you were over there on the 31st of December, 1896, did you not put up some other notices besides on the northeast quarter?

Objected to as irrelevant and immaterial and not proper cross-examination. Objection sustained and exception.

Assignment of Error No. 5.

The WITNESS: On the morning of the 31st of December, 1896, after I started out to make this location I first went on some land other than the northeast quarter of 20, went to the middle of the west line thereof.

Q. What did you do there?

Objected to on the ground that it is irrelevant and immaterial. Objection sustained and exception.

Assignment of Error No. 6.

Q. Did you post a notice in the middle of the section, at the corner common to all four quarters?

A. A man by the name of Haunfeldt went with me to the southwest corner of the quarter section. I never put up any notice on the northeast corner. I put a monument at the center of the section, the corner there common to all four quarters of the section; put a monument there up on the northeast quarter.

The COURT: I say, as relating to this corner he may answer, but if he did anything at that corner of the quarter section, which as I understand is a corner common to the four quarters, if he did
102 anything relating to any other quarter he can't answer it. Exception.

Assignment of Error No. 7.

The WITNESS: I don't know whether or not any of the other parties except Mr. Miller and myself ever saw the location notice or not; if I showed it to them I do not remember it now. There was no agreement between us that they would pay their proportion of any expense that might be incurred in locating and developing this land for mineral purposes. The conditions were just these: that I would locate them on the land, and the first cost was nominal, amounted to nothing practically, I would settle that, and if we had assessments later I could call upon them for their proportional part of the assessments later. They said all right.

If my brother-in-law, Ernest L. Smith, had at that time made application to purchase this land I presume I knew it; I remember the circumstance and presume I talked the matter of making these applications to purchase these lands over with Mr. Miller and Mr. Hannah. It may have been agreed between us that Mr. Smith should make application to the State to purchase this particular quarter section.

Q. Didn't you know at the time this location was made upon the northeast quarter that Mr. Miller then had in his possession a deed from the Producers' and Consumers' Oil Company to himself conveying all interest that that company had in this particular quarter section of land?

A. If Mr. Miller had—now as to dates I can't tell you. I
103 presume I knew it, no doubt but what I knew it at the time; I don't know, I can't say as to the dates. If Mr. Miller had anything of the kind no doubt I knew it at the time. Presumably I had some interest in this quarter section of land on the 26th day of December, 1896, the date of the deed from the Producers' and Consumers' Oil Company to Mr. Miller. I think it is a fact that on the 29th day of December, 1896, the day before we went to Oil City, that Mr. Miller agreed that he would make an abandonment of any interest he might have in this land that came to him through this Producers' and Consumers' deed. I think I saw the instrument in writing releasing and abandoning all interest that he had in this land to the U. S., and I am sure that I knew of it; I think it was discussed between us at the time that such should be done.

Q. And that was with the intent and purpose so that you could put your mineral locations upon this particular quarter section of land on the 31st day of December, 1896, was it not, Mr. Hall?

A. We filed on that date, yes, sir.

Q. Well, those other things had been done preliminary to that, had they not?

A. The other things, if I understand you, you mean that he had made this abandonment? He had.

(Question read.)

A. Well, I don't know hardly how to answer that.

The COURT: Do you understand that?

A. I don't know whether I do or not.

The COURT:

104 Q. Did you understand at that time that Mr. Miller had released his interest in that to the Government so that you and he could file your mineral claims on that quarter section?

Mr. COLDWELL: If he knew that Miller filed an abandonment?

Mr. HARRIS: We admit that.

Mr. COLDWELL: Of course.

The WITNESS: Well, I don't think I comprehend what you——

The COURT: What was the purpose of Mr. Miller filing that release, did you know?

A. I think so.

Q. Well, what was it?

A. It was to abandon it, I believe, to the Government, the way I understood it.

Q. What I want to know, what was the intent and purpose between you and Mr. Miller of making that abandonment?

Objected to on the ground that it is not cross-examination.

Objection sustained. Exception.

Assignment of Error No. 8.

The WITNESS: I have an interest in this particular piece of land at this time. It was in the forenoon of the 31st of December, 1896, that I was at the middle of section 20. I don't think it had rained that day. It may have rained the day before. I don't think the ground was muddy that morning when I went over to that quarter section. I did not that I remember, see any signs of any other person—tracks of a man or any evidence of any person having been there recently. I think I left the Barrett camp or office
105 about half past 11. I went to Coalinga and thence to Visalia. I think I was up there afterwards during the year 1897. The stake at the middle of this section was intended for 3 by 3, but I don't think it was quite that large. This was the one I found there, not the one I put there at all. I put a stake there. The one I found there I don't think had any marks on it. I don't think there was any rocks or earth piled up around this stake when I went there.

Articles of incorporation of the Home Oil Company, setting forth that a majority of the incorporators are citizens and residents of the State of California; that the name of the corporation shall be the Home Oil Company; that the purposes for which it is formed are to own, buy lease and sell real and personal property, to bore and mine for oil, gas and minerals, to build pipe lines, conduits, refineries and to carry on the general business of producing and refining oil for illuminating, lubricating and other purposes, and the manufacture of fuel from petroleum, and to furnish gas for lighting and other purposes; that the place where the principal business is to be transacted is Fresno City, Fresno county, California; that the term for which it is to exist is fifty years after date of incorporation; that the number of directors shall be five; the names and residences of those who are appointed for the first year; that the amount of the capital stock is $100,000, divided into one hundred shares of the par value of $1000 each; that the amount of capital stock actually sub-
106 scribed is $80,000; by whom it is subscribed and the amount subscribed by each; dated December 12th, 1896, signed and acknowledged by all the subscribers, and filed in the office of the clerk of Fresno county, California, December 15th, 1896, is here offered and received in evidence.

C. A. CANFIELD, sworn for plaintiffs, testified in substance as follows:

I have resided at Coalinga 3 or 4 years, and am a stockholder in the Home Oil Company. I am acquainted with the northeast quarter of section 20 in controversy. On the 31st day of December, 1896, we were operating about 200 feet from the west line of the northeast quarter, and near the northwest corner of the same. I saw E. O. Miller and W. F. Hall on that date; I met them at the office of the Home Oil Company that morning; the office is about 200 feet from the west line of that quarter section. I saw Mr. Miller go to the northwest corner of the northeast quarter of the section on that day and do some work which I afterwards went over and looked at and found to be a location notice. I went over soon after he left the corner and he went towards the northeast corner. I went over to see what he was doing. At the northwest corner he placed a notice of location, or I don't know whether he placed it or someone else. It was there when I got there. I saw Mr. Hall go over there earlier in the morning and come back. When Mr. Miller went over to the northwest corner he had some object in his hand, and when I got there, some ten minutes later, I found a little stake with a board nailed on it with the location notice upon
107 the board; there was also a small rock monument built there. I read the notice and the names upon it; the notice described the northeast quarter of section 20, T. 19, S., R. 15 E., and the names on the same included E. O. Miller, the two Halls, and I think Mr. Overall, and I don't know as I could name the others. I am and since last December have been the manager of the Home

Oil Company, and was over there during all of 1898 and 1897, and am acquainted with the officers and agents of the Producers' and Consumers' Company; the Home Oil Company has been in possession of the land in question during the years 1897 and 1898. The owners of stock in the Home Oil Company are the owners of stock in the Producers' and Consumers' to quite an extent. L. L. Cory is one of the directors of the Producers' and Consumers' Company, and he has been over there where the Home Oil Company was operating at various times during the past two years quite frequently. The Home Oil Company commenced work grading a little piece of land and erecting a derrick some time in the month of July, 1897, on the northeast quarter. That was the first work the company did. The next work the company did was to erect a derrick about 30 feet from the line of the Coalinga Oil Company's ground, dividing line between the two places, and bored a well where they erected that derrick. They struck oil at that well.

During the year 1897 the Home Oil Company expended between five and six thousand dollars on the northeast quarter of section 20.

108 The next work that was done by the Home Oil Company was to erect another derrick and drill a well about fifty feet from the first well. This well was completed. It was commenced about January, 1898. In December, 1897, they erected their derrick there. The first well is a producing well and they are pumping it yet. The second well was completed about January 1st, 1898. I should judge the second well cost them during the year 1898, $8,000, and that well is now in operation. The next work was building roads and erecting another derrick about 500 feet still further south on the line of the same land. They commenced work on this third well I think in May, 1898. It was practically completed about the first of February, 1899. I should judge they spent on this well during the year 1898 in the neighborhood of $12,000.00. This is what is known as the "Blue Goose" well, and is a producing well. In 1898 the Home Oil Company expended about $8,000.00 on one well and the same is in operation now, and in May of the same year commenced work on another well, and completed the same in January, 1899, and expended thereon about $12,000.

There had been work done on the land in question prior to the time that the Home Oil Company did the work mentioned; it was done by Frank Barrett in November or December, 1896, and consisted of road work and the building of a derrick, and was of the value of about $300.00 or $350.00.

I went to the northeast corner and the southeast corner of the quarter section in question on the 2nd day of January, 1897. At the northeast corner there was a stake and a monument of stone

109 and at the southeast corner a monument of stone, each about 18 or twenty inches high; I did not go to the southwest corner at that time, but did in the latter part of January, and found three stone monuments there similar to the other monuments

described. I saw small stakes driven about 20 rods apart on all of the boundary lines of this quarter section. They were placed there by a surveying party in 1896, some seven months I should judge before the 31st of December, 1896. They were short stakes about an inch and a half square and stood out of the ground probably eight inches. I live about 40 rods from the land in question, from which point we could see much of the land, and also worked where we could see parts of it, and up to the time Mr. Miller was there on the 31st of December, 1896, there was no person upon any portion of it to my knowledge. I was on the land very often during the months of September, October, November and December, and saw no evidence of anyone being there. People could have gotten on the quarter section and I not see them. So far as I know there were no other persons on the land on the 31st of December, except Mr. Miller and the parties who went there with him and myself.

Motion that the testimony of the witness in regard to these small stakes that he saw on the lines and testified were there before Mr. Miller made his location, be stricken out on the grounds that it is incompetent, irrelevant and immaterial, does not tend to prove any issue in this case whatever.

Motion denied and exception.

Assignment of Error No. 9.

Cross-examination:

110 I have been acquainted with the northeast quarter of section 20 ever since I have been in that country, and never knew of any discovery of any oil on it prior to the boring of these wells by the Home Oil Company, and never saw any indications that there was oil in that territory.

I know a man named A. Barieau; he had a house on section 20 but I did not see him there on the 30th or 31st of December, 1896; he kept out of sight; I understood he was there, but we did not suppose that he was in camp. The 30th was a pretty cold day and it sprinkled a little that night and was storming some the next day, and on the morning of the 31st I think the ground was somewhat wet on top. When I went over to the corner where I saw this notice stuck up, there was besides this notice on that stake a mound or rocks built around the stake. The stake was driven a little to one side. I had been at or near that corner frequently during the month of December previous to that date. When I was there before, that mound was torn down, scattered about. There was a stake lying there, lying down during that month, but none sitting up on the monument.

I visited the southwest corner of the land in question about the 20th of January. This corner is in sight of my cabin and I can see the stake from my office; there is a hill between—the hill that the Blue Goose well is on—but I can look over it and see the corner;

my house is a little over half a mile from the corner. I did not see any evidence of any work having been done upon this quarter section on the south side, not very far from the southwest
111 corner in the month of January, 1897. There was evidence near the center of the claim on the west of the center where there had been a furrow run and V—probably a couple of hours' time put in with a plow, and V was the only work I saw. I wasn't aware that it was done as work. I don't know who did it. I don't think I left there but three or four times during the year 1897, and then not to be gone over three days. My impression is that I noticed this work first in December, or some time before the year 1897.

None of the improvements or expenditures on the northeast quarter, placed there by the Home Oil Company, have been on the lands claimed by the defendants Chrisman. There have been improvements on these two 20-acre tracts; there is some road built, a derrick there, two houses built and some other buildings placed on the same. I don't know, but suppose Mr. Chrisman put them there.

Re-direct examination:

The probable value of the improvements put on this land by the Home Oil Company, including improvements, wells, tankage, pipes, and everything of that kind, would be, I should judge, between 40 and 50 thousand dollars. The Home Oil Company uses these tanks and other things in its operations on this northeast quarter exclusively for the Home Oil Company. The Blue Goose well is on the southwest 40 of this northeast quarter on the northwest. It is not a fact that the Blue Goose is a little north of the 80 acre line.

112 The plaintiffs offer in evidence the affidavit of I. F. Poston as to labor performed on the land in question during the year 1897.

Objected to on the grounds that it is incompetent, irrelevant and immaterial.

The objection is overruled and exception.

The offer, after the venue, is as follows:

"I. F. Poston, being first duly sworn, deposes and says:

"I am a citizen of the United States, of lawful age, a resident of the county of Fresno, State of California; I know the northeast quarter of section twenty (20), in township nineteen (19) south, range fifteen (15) east, Mount Diablo base and meridian. I further depose and say that since January 1st, 1897, and prior to January 1st, 1898, the Home Oil Company caused work to be done on said northeast quarter for the purpose of developing oil and petroleum thereon; that said work was of a greater value than $800.00, to wit: of the value of about three thousand dollars; that said work was done for the benefit of and at the request of E. O. Miller, the owner of the placer mining claims filed thereon, and consists of excavating ground, building roads, building derrick, buying boring apparatus

and the boring and completing of a successful oil well about seven hundred feet deep."

Signed by I. F. Poston, verified and recorded in the office of the county recorder of Fresno county, Jan. 3, 1898, and marked Plaintiffs' Exhibit No. 4.

Assignment of Error No. 10.

Plaintiffs offer in evidence similar affidavit of the same
113 party of work done upon the same land during the year 1898, fixing the value of the same at $10,000.00, signed and verified and recorded in the same office on the 14th day of December, 1898.

Objected to on the grounds last above specified.

Objection overruled. Exception.

Assignment of Error No. 11.

HARRY LEVINSON, sworn for plaintiffs, testified in substance as follows:

I am, and on the 1st day of January, 1896, was, a citizen of the United States, born in San Francisco.

Cross-examination:

I am one of the parties mention- in this location notice dated Dec. 31st, 1896, upon the northeast quarter of section 20, 19, 15.

D. G. OVERALL, sworn for plaintiffs, testified in substance as follows:

I was born in Texas, July 27th, 1858, and am a citizen of the United States.

Motion to strike out the testimony of the last two witnesses on the ground that it is incompetent, there being no allegation in the complaint that these locators were citizens.

Motion denied. Exception.

Assignment of Error No. 12.

CHAS. H. SMITH, sworn for plaintiffs, testified in substance as follows:

Q. Are you a citizen of the United States?

Objected to on the grounds last above stated.

Objection overruled. Exception.

Assignment of Error No. 13.

A. Yes, sir; born in the State of Ohio in 1871.

It is admitted subject to the objection and exception to the admissibility of the evidence that L. E. Hall and R. B. Biddle were at all times during the year 1896 citizens of the United States.

114

Assignment of Error No. 14.

Plaintiffs rest.

The defendants and intervenor move for a nonsuit upon the ground that it has not been shown that upon the 31st day of December, 1896, the ground claimed in this action by the plaintiffs was at that time vacant, unappropriated Government land and the subject of location by any person whomsoever. Next, it has not been shown that a valid location, if one was attempted, was made by the parties attempting to locate it at that time.

Third, that it has not been shown that at that time the land attempted if any was attempted to be located, was marked upon the ground by monuments or otherwise, in such a manner as to make the boundaries known, or, in other words, that the boundaries were not marked so as to be distinct, the location was not distinctly marked upon the ground.

Next, it is not shown by the plaintiffs that the parties attempting to make the location at the time then knew that there was mineral in the soil attempted to be located within the boundaries of the alleged location, if they were made; in other words, that there was no evidence shown to the court that at this time that the parties attempting to make the location were aware that the ground
115 was mineral in character, and that, of course, is preliminary to a location.

Further, that they have not pleaded their source of title, and that what is not pleaded cannot be cured by evidence. Next, that the alleged locators have not shown, or it has not been shown by the plaintiffs here that the alleged locators conveyed any title which they may have initiated by the attempted filing of a notice or by attempted location of the plaintiffs here.

Next, it has been shown by the parties here that there was some possessory title anterior to the 31st day of December, 1896, and that it was attempted to be abandoned on or about the 29th or 30th day of December, 1896, and that it could be done at that date for no other purpose than to evade the forfeiture laws of the United States and to avoid the performance of the necessary assessment work, and therefore the attempted location by the party then holding the title in order to avoid the assessment work made the attempted location void.

Motion denied. Exception.

Assignment of Error No. 15.

A. BARIEAU, sworn for defendants and intervenor, testified in substance as follows:

My residence has been in San Francisco for about 13 months;

previous to that time I resided in Selma; had resided there since 1878.

I am well acquainted with the northeast quarter of section 20, T. 19 S., R. 15 E. I was on this land in April, 1895, and put a mineral location on it.

(Document shown witness.) That is the notice I put up, I
116 think, or like it, and is about the substance of all the notices I put up at that time. I know part of the persons whose names appear on that notice, and some of them I do not know. I put that notice up on the northeast quarter of section 20 on the east side of the road going up to what is called Oil City. The purpose of posting the notice at that time and place was to take up the land to operate to produce oil—petroleum. At the time I posted the notice I had been over the land in question—very much over the entire northeast quarter, and had discovered indications of petroleum thereon. I made the discovery near the east line of the northeast quarter.

This is a certified copy of the notice I put up.

Defendants offer in evidence a certified copy of location notice made upon the northeast quarter of section 20, T. 19 S., R. 15 E. Located on the 14th day of June, 1895; names of locators, Frank Barrett, K. W. Brown, Jas. L. McLean, James E. Campbell, J. J. Bright, Jas. A. McClurg Sr., Hart H. Barrett and A. Barieau; recorded July 16, 1895, in the recorder's office of Fresno county, and the same was received in evidence.

The WITNESS: At the time this notice was posted there was no mining district in that country that I know of, and there was nobody occupying any portion of the northeast quarter of this section 20, and there was no buildings or structures of any kind or character upon the premises. There had been no work whatever done upon the premises. There was nothing further done until January 2, 1896. I was on the land time and again between the time
117 I posted the notice and January 2, 1896, and no person had entered upon the same or occupied it in the meantime. I was present when the survey was made. At the time the survey was made the land was divided into 20-acre tracts and monuments put up at the corner of every 20 of the northeast quarter. We run the north line of the northeast quarter and every ten chains—I can't bring to mind now exactly how we laid the 20's, which way the 20 was laid off. It was a quarter of a mile one way, ten chains one way and 20 the other, but I think ten chains was laid running the line east and west every ten chains was a monument. Each tract would be 20 chains long and 10 chains wide, but I do not remember whether we laid off the long way north and south or east and west, but I think the 10 chains was laid on the line running east and west, and every 10 chains we placed a monument of stone put in the ground with "J. H. F." as a monogram, and the number on it. At the northeast corner we found a good well marked old Government

corner of stone imbedded in the ground. The southeast corner was a 3 by 3 stake with a stone monument around it. On the line between the northeast and southeast corners we put up a monument of stone with the monogram "J. H. F." and the number on it. On the southerly line of this quarter there was a monument of stone with the monument "J. H. F." and number on it placed every ten chains. At the southwest corner, the center of the section, there was a stake and four little monuments around it marking it plainly and distinctly. On the west line of the quarter we placed a stone
118 monument with the monogram "J. H. F." and number on it 20 chains from either corner. There was a stake at the northwest corner, and Mr. Finley marked it and established a corner there. That survey was made in furtherance of my location of June 14th, 1895, and for the purpose of marking the boundaries of the claim attempted to be located. We also ran a line east and west through the center of the section and placed a stone monument marked as I have stated with the monogram and number every 10 chains. This was done for the purpose of marking every 20-acre tract, but the notice was posted on the quarter section as a whole. I was there during the whole of the year of 1896 up to October. Any of the time when I was over there over the land during the year 1896 I did not see any person doing any work upon the premises. I did none myself and none of my co-locators did any work on these premises. I had a cabin on the northwest quarter and lived there during 1895 and 1896 up to October, and from October was there off and on, over the land, and did not see any buildings, or derrick, or work of any character done on the northeast quarter.

The Finley survey of 1896 covered more land than the northeast quarter.

Q. What lands did it cover?

Objected to on the grounds that it is irrelevant and immaterial.

Objection sustained. Exception; and it is understood that the offer of evidence extends to December 31st, 1896, and January 1st, 1897.

Assignment of Error No. 16.

119 The WITNESS: On the 14th of June, 1895, I was, and at all times subsequent have been a citizen of the United States. I was on the land in question on the 30th day of December, 1896, between two and three o'clock in the afternoon; I first went to the east line of the northeast quarter. It rained some and was blustery and showery and rained some and the soil was a little sticky so that wherever a man went it left his track. The land is adobe and will leave a foot mark very plain after a little rain. I went to the southeast corner and found the stake and put up a location notice for a placer mining claim for the northeast quarter of section 20, T. 19 S., R. 15 E. I saw no footprints or any evidence of any other person

having been there since it had rained. I stayed in my cabin the night of the 30th and went on the land in question again in the forenoon of the 31st. On the 31st in the afternoon my notice of location was still there, and there was no indications of any other person having been at the southeast corner. I noticed nothing except my own footprints. This might have been one or two o'clock in the afternoon and the ground was damp enough to stick a little and left a footprint very plain. I did not see any footprints along the east line, nor going from the southeast corner to the southwest corner and I was particularly looking for some too. I went there for the purpose of looking over this land and went over it in several ways and looked over it very carefully, but did not observe any indications of any person having been there on the 30th or 31st ex-
120 cept myself. I did see some footprints, however, at the southwest corner.

The notice I posted on the southeast corner was on letter size paper tacked on a board and the board put on a stake about two feet above the ground, and was posted so that it could be seen 50 or 100 feet from the corner. I had the notice recorded in the office of the recorder of the San Joaquin mining district.

Standing at the center of section 20 Mr. Canfield's house or office cannot be seen. At that time it was in a gulch so you could not see over either way, on account of the hills all around: the gulch that goes up there is crooked and hides the view from all around.

After the 31st day of December, 1896, I don't remember when I was on the ground again, and after that date I don't remember of ever seeing that notice again.

Cross-examination:

I first went over to the oil country in April, 1895, and posted the location notice on the 14th day of June, 1895. In the first week of January following we started in to make the survey and mark the boundaries under that notice. There was no other notice that I know of posted on or in connection with the northeast quarter of section 20.

We were surveying the land generally and marking it into 20's. We first went around and made the lines and then divided it into 20's afterwards. We first went there in June, 1895, and posted a notice. In Jan-
uary, 1896, in pursuance of that notice we went there with a sur-
121 veyor and sub-divided the land into 20-acre lots and established those monuments. There was no other notice of location posted on or in connection with the northeast quarter of section 20 between the 14th of June, 1895, and the survey in January, 1896, that I know of. I can't remember exactly the corner that we started from to make this survey of the northeast quarter of section 20, but I think it was the northwest corner near Oil City. We run east if I remember right. We didn't first put up a monument on the northwest corner where we started. The lines were run first and then cor-

rected back, a cross line. The monument was the last thing that was done in the survey when all the lines were corrected. During the survey the surveyor put up a corner at the northwest corner, if I remember right, and we marked the corner of each 20 acres in that quarter section. They were all numbered from 1 to 8 and monogramed J. H. F. If I remember right, they were all stone monuments. That work was completed in January, 1896. Each 20 acres was laid out as indicated in the Defendant's Exhibit No. 4, and each 20 was a quarter of a mile long north and south, and one-eighth of a mile east and west. From the time the survey was made I was at my cabin situated about ⅛ of mile south-westerly from the northeast corner of the northwest quarter of section 20, and was there continuously until the month of November, 1896, with the exception of a day or two occasionally. From the latter part of October I was there off and on; I don't remember the time I was there except this particular time in December, and was there on the 30th
122 of December. I am positive there was no work done on that quarter up to January 1st, 1897; that is, work that would have shown, either a road or a derrick. I am positive there was nothing of that kind.

I saw Mr. Miller and Mr. Hall there on the 30th and 31st days of December. On the 30th of December I went over to locate this quarter section, did not advise anybody of my intention, and did not say anything about locating it after I came back.

I saw some indications of oil on this northeast quarter in 1895, in June and frequently since; all through the month of May up to June I did nothing else but prospect around; I was there off and on quite often, crossed in every way. Was close to the east line, close to the southeast corner. The place where I saw the indications of oil is about 10 chains north from the southeast corner, and about 5 or 10 feet inside the section line; it comes out with the water, floats on the water. There is a permanent spring there, especially in the summer when it is hot. The oil runs there in the summer. I know the location because I surveyed it—run the line. There is a spring there and the oil comes out and floats on the water in the summer time when it is hot. In June, 1895, there was a little water with oil and a little oil with the water coming out. It was dripping over a rock about two feet high. There was no pool, it was dripping, just dripping a little water and oil, not much water. It was a narrow gulch. It didn't run down any distance from the point where it dripped in, only may be two or three feet. It was damp for
123 quite a distance, but no water any distance at all, just where the cropping was, the rock cropping. I am not personally acquainted with Jas. L. McLean or Jas. E. Campbell or J. J. Bright; never saw them in my life. I don't know whether I am interested in this northeast quarter now; I think I have, I am not certain.

WILLIAM E. FEARON, sworn for defendants and intervenor, testified in substance as follows:

I am acquainted with Henry Chrisman and A. Y. Chrisman; I know where their claims are on the northeast quarter of section 20; I was there on the 31st of December, 1898; I was going toward Henry Chrisman's claim and met him wheeling a wheelbarrow, and I went along with him to where they were running a tunnel and I went inside the tunnel with him. There were two men working in there running a tunnel; that was on his claim, and we stopped there ten or fifteen minutes and we went off up there on the east side of the hill towards his father's place. I saw two men in there that was wheeling out dirt, black shale, out of the tunnel; besides the dirt I saw a little water and oil in there, a little oil in there mixed with the water. The tunnel was probably about between 15 and 20 feet deep, running in, including the approach to it; the tunnel proper was probably about 14 feet in and about 6 or 7 feet high and four and a half feet wide. I don't think I saw anything else on Henry Chrisman's claim that day; there was a road passing by about 150 feet from the tunnel; there was no buildings there then. From there we went west to A. Y. Chrisman's claim; he had a cabin
124 there probably 12 by 14, and roads running right by it. I have been there since, since that day there have been roads built there on that claim and a derrick.

I know where the New York derrick is; it can't be over 10 or 15 feet from the center of this quarter section, the southwest corner of A. Y. Chrisman's claim; I have been right there at the New York derrick extending close to this corner. I know where Mr. Canfield's office is; I cannot see his office from that corner.

Cross-examination:

When I speak of Henry Chrisman I mean H. T. Chrisman; he is the son and A. Y. Chrisman is the father; Henry Chrisman's claim — on the southeast corner of the northeast quarter of section 20, there are 20 acres in his claim; A. Y. Chrisman's claim is the southwest corner of the northeast quarter of section 20 and there are 20 acres in his claim. There are 20 acres in A. Y. Chrisman's claim. I know it was on the 31st of December that I saw these people working in that tunnel, because I was up there that day and went to work for Mr. McClurg on the 2nd day of January, 1899. I took my father up to Mr. McQuiddy's place that day. I went up there to see about getting work from Mr. McClurg. I didn't have to pass over this Henry Chrisman place to go to Mr. McQuiddy's place. I met Mr. Henry Chrisman there and I walked around with him. I met him between his claim and Mr. McQuiddy's house. He was wheeling a wheelbarrow at the time. He was taking it to the tunnel. I was probably a quarter of a mile from the tunnel when I met Mr. Chrisman. I didn't ask him what
125 he was doing. I found men at work over there on the 31st day of December, 1898. That was the only work that I saw

them doing, at that time there were roads built there. I saw him up there one time, but I couldn't bring to memory when it was that he had a horse and plow and V up there making roads. I couldn't be sure that this tunnel was timbered in any way. I couldn't say whether there was timber or not. I have not been in there since. I don't know when the tunnel was commenced. I don't know where these men are that were at work in it. They were strangers to me. The tunnel was running to the side of the hill. I know what a ledge is; I don't know as I know what a lode is. I know what gypsum is. There was gypsum around where they were digging and running that tunnel. I didn't ask him at all what he was working for around the tunnel. There was a little oil around in the tunnel on the water. The oil was right on the water, and the water in the mouth of the tunnel. A. Y. Chrisman's house was a cabin made out of boards and shakes, just one room; I don't know how many windows; I think about two; I know there was one. They had no shutters, just a window put in there, just an opening in the wall. The house is about 12 by 16, about 8 feet high. There was a stove and stove-pipe in it. I never went to see where the roads I spoke of commenced. It ends on down on the end of their claim. The road I saw that day goes to Coalinga and by there. I don't know what connection that road had with the A. Y. Chrisman road; it connects with the
126 Coalinga road about three or four hundred yards from A. Y. Chrisman's place.

I know where the southeast corner of the northeast quarter of section 20 is, it is right close to that tunnel, I should judge about two or three feet from the mouth of it. That is not a well with water in.

Q. Now, then, the question is, was there a well with water in it there.

A. Well, I couldn't answer that question because I don't know. I didn't see any there, I never looked. I have not been back there since, and was not there before, was never at that corner before.

H. T. Chrisman (one of the defendants), sworn for defendants and intervenor, testified in substance as follows:

I was born in Arkansas and am 23 years old past. I know the northeast quarter of section 20 in controversy here in this case. I know where the Chrisman claims are that are in controversy, here have visited them. I located a claim here on this quarter section. I went there the 31st of December, 1896. When I made the location it was in the morning of the 1st of January, 1897. I was up there the day before, visited the premises there the day before, December 31st, 1896, and made an examination of the two claims; we didn't do anything that day except to inspect them; Mr. McQuiddy. A. Y. Chrisman, my father, and my brother were with me; I don't remember whether the elder Mr. Fearon was there or not. On the morning of January 1st, 1897, Mr. Fearon and my father and Mr.

Lavelle and myself, and I think young Mr. Fearon,
127 left Mr. Lavelle's cabin, which is just north of the south line of the southeast quarter of section 20; I had a location notice with me, and my father had a location notice too, I believe; we followed a general course from Mr. Lavelle's cabin and came around by the middle of the south line here and came around to the southwest corner of the northeast quarter of section 20; there we waited until one o'clock a. m. by the watches, January 1st, 1897, and at one o'clock my father posted his notice just inside of the northeast quarter on the first 20 acres. The southwest corner lays in a little gully. This part of the northeast quarter slopes off to the southwest and there is a gully cuts down through the country 18 or 20 feet deep there and down in this gully is this corner. When my father put up the notice at this corner there was a pile of rocks—stone there, five or six inches high, small rocks, some of them 6 or 8 inches long and 3 or 4 inches thick, probably a dozen or 15 of those piled by a stake there, the stake was a 4 by 4 Oregon pine stake, there was cut on it a quarter mark—1-4—and I forget the letters that were there. My father placed the notice just to the northeast of the corner, a few feet, on the northeast quarter of this section 20 in controversy. When my father finished nailing his notice Mr. Lavelle, Mr. McQuiddy and myself left that morning, taking about the same course we came around on; we came right around back to the southwest corner of my claim, and southwest corner of this 20 acres, it is the middle way between the southeast and southwest corners of the
northeast quarter—middle of the south line of the north-
128 east quarter in controversy here, stopped there and posted my notice just at the corner of my claim, but just to the northeast of it, in my claim, 18 or 20 feet back from the corner, the notice was posted on a board nailed to a stake and the stake stuck in the ground. I remember what the notice was and the date of it and the names that were on the paper, and would be able to state the names. I saw that original notice afterwards but it is not there now, the weather or something destroyed it, it was torn down, blown away or something. I missed the notice a couple or three months after I put it there. I was there along in March—February or March—and the notice was gone. I have never seen it since. I do not know where it is. I had a copy of that notice with me that night, they were exactly alike.

Q. Duplicates exactly alike, in your handwriting, both of them?

A. No, there was one thing different in the two notices; there were three words, three or four words left out of the notice that I kept.

Q. The copy?

A. I thought it was an exact copy at the time, but found afterwards there were three or four words left out of the notice I kept. When the notice was sent back to me I found that there were missing—from Fresno.

Q. These words?

A. Yes, sir; I sent this notice I kept to the recorder's office to be recorded and these three or four words were missing. I know they were in the original notice, because I had seen the notice posted, and the next morning when I was up there I read it carefully to see if it was all correct. Then I found that the copy I had made left
129 out these three words. I afterwards corrected my copy. I made that correction by having Mr. McQuiddy, my attorney, write out the correction, or write out a corrected copy and have that recorded in Fresno. The last time I saw that notice was in March, 1896. I was up there in March and found it gone, that is where I found it gone. It was along in February when I last saw it, some time about the 20th. The first time I saw the notice after I posted it was the morning of the 1st about 9 o'clock. I saw it again that day, and again about the middle of the month. The next time the latter part of January or the first of February. I know that I sent to Fresno a true copy of the notice.

Q. (Handing paper to witness.) You examine that and see if that is the correct copy that you had made by your attorney, or if you recognize that as a correct copy, first identify it, I am not offering it in evidence.

The WITNESS (continuing): I recognize that as the copy I had. I recognize the notice, that is the copy that I kept and sent to Fresno. This last one will show the words that were omitted in the correct copy. The words "northeast quarter" were omitted. I don't remember just where it is. This notice is a correct copy with the mistake corrected.

Said notice was placed in evidence, of which the following is a copy:

Location Notice.

Notice is hereby given that the undersigned, in compliance with the Revised Statutes of the United States, has this day located
130 the following described placer mining ground, viz: Commencing at the southeast corner of section twenty (20), township nineteen (19) south, range fifteen (15) east, M. D. B. & M., running thence north forty (40) rods, thence west eighty (80) rods, thence south forty (40) rods, thence east eighty (80) rods to place of beginning. It being the south ½ of the southeast ¼ of the northeast quarter of sec. twenty (20), township nineteen (19) south, range fifteen (15) east, M. D. B. & M., located for mining purposes, situated in Fresno county, California.

This claim shall be called the Paradise placer mining claim. Located on the 1st day of January, 1897, at one (1) o'clock a. m.

H. T. CHRISMAN.

Witnesses:
THOS. J. McQUIDDY.
M. M. LAVELLE.

Endorsed: 221. Filed for record at the request of H. T. Chrisman, Jan. 9, A. D. 1897, at 2 min. past 8 o'clock, a. m., and recorded in vol. K of mining claims, page 436, Fresno County Records. W. W. Machen, recorder. By Jno. La Blanc, deputy recorder. Marked Defendants' Exhibit No. 6. Filed May 4, 1899. G. W. Cartwright, clerk. By J. S. Pugh, deputy.

The WITNESS: After I had placed the notice upon my claim I left there and went back to Lavelle's cabin and went to bed. I revisited the premises about 9 o'clock on the morning of January 1st, 1897. I brought with me a chain and measured out those claims we had located that night. My father and Mr. Fearon came with me. I came around about the same direction as we came the night before to the southwest corner of the northeast quarter and com-
131 mencing there we chained north 10 chains and there established a monument; we found a stake there and around the stake we piled up a pile of rocks six or eight inches high; then we went back to the southwest corner and chained east 20 chains, found a monument of stone there and also a stake; that stake was near where my notice was; there was quite a monument of rock there; we chained north from there ten chains and put a stake down; coming back to this center place of the south line we chained east from there to the southeast corner of my claim and found a stake there 4 by 4 and a monument of rock. A notice had been posted there a couple or three years before, and had the names of Wilson, Anderson and —— —— on it. I saw a notice west of there about 15 or 18 feet on a stake with a board nailed on it and stuck up in the ground, it had the names of Barieau, Barieau, Barieau, Sides and Bachtold and one other on it. As that monument was very good, a large stake there, we didn't bother it much if any, might have laid a rock or two on it. We chained north from there ten chains and as rocks were very plentiful there we piled up quite a monument there, and as there was no stake there I placed a stake there. Chained west from there and we found that this place that we had chained north to from the center of the south line was right at the place of 20 chains running west from the last monument we made. Running west from that we established a monument around this stake that we had put there and after staking out those claims we went around this section. We surveyed this claim of my father's first and
132 then surveyed mine out. On the east and south and west lines in going around these two twenties we put down intermediate stakes only a short distance apart, in surveying we put those down at the end of the chains, each length between those corners, and besides that we put down some larger stakes, about six, on the south line, intermediate stakes, to two large stakes, south line of both claims, one intermediate stake on the south; and on the north we had some five large stakes along the north line, and five along the south line, with intermediate small stakes, little oak stakes; on the east and west lines we had a lot of our little stakes, nine on the

east line and nine on the west line, and about nine we placed on the dividing line between the claims running north and south; these small stakes stuck out of the ground about 6 or 8 inches, they could be easily seen going along the line easily traced.

After surveying that out we went around the quarter section, the different corners, of the whole quarter section; up on the northwest corner is the first one we came to after surveying there: I found a notice there, a monument and stake in it, but this notice was not in the monument—rock; it was on a stake close to it, couple of feet from it, just one side, this was the notice of Mr. Miller and Overall and others, it was situated just inside of the northeast quarter, not in the monument of rocks, a couple or three feet from it; there was a large monument of rocks, 2 feet through, possibly, and something like 18 inches high. It looked like an old monument. We
133 went easterly from that to the northeast corner and there found a monument of stone in fairly good condition; it did not show any signs of recent building, it might have been rebuilt, stone laid on it; there were some footprints around that monument. We left there and went down to the southeast corner, by it, and went back home to our place.

I was acquainted with the northeast quarter during the year 1896; I know the country around about the northwest corner of the northeast quarter; I know a place where there is some debris of a derrick at this time, was the last time I was there sometime about the first of March; this debris is to the east from the northwest corner, a few hundred feet east and south of the north line of the northeast quarter. In 1896 I was over there looking specially for anything of the kind and I saw no debris there. I never saw a derrick standing there until after the first; I remember what year a derrick was built there, it was in 1897; I know it was in 1897 and not in 1896 because I was right through there several times and didn't see it there, and when I was back there in the spring of 1897 it was built or being completed, looked like it was about completed, that was some time along about in April or May. In December, 1896, I was up around that ground and in a position to observe the spot where I know that the debris now is and there was not any derrick there at that time or debris, I am positive of that; there are several derricks there now, but this debris is well towards the northwest corner of the northeast quarter; I saw that first along in the spring of 1897, the derrick was standing at that time and
134 was the only derrick on that northeast quarter at that time.

I saw Barieau's notice there near the southeast corner of that quarter section on the 31st of December, 1896, about four o'clock in the evening, it is not there now, I last saw it there some time after that, a short time.

During the year 1896 there was not any mining work done on that quarter section that I saw, I looked to see if there was any, I looked over all of the quarter section in controversy and found none.

Q. Well, did you make any search before placing this notice up there for any evidences of mineral, petroleum or oil?

A. It wasn't necessary. As soon as I went there I saw some.

Q. Where did you see it?

A. On the southeast corner of the northeast quarter. On my claim.

Q. Have you ever searched on the claim known as your father's claim, whether there was anything discovered there or not?

A. I have looked over it lots of times but long before that time. There is one place up there where the oil is almost oozing out of the rocks, looks very oily, nearest prospect of oil I have ever seen there. Other minerals I have not seen on it.

Q. Who has been occupying those two twenties since January 1st, 1897?

A. I was right there a good part of January and February along in the spring, and I was on there in the fall at work, and then again in the spring of 1898, or in January and February I was there some, and then in the fall of 1898 I was there twice,
135 three times, and after December 20th I was on there continuously the rest of the year.

Nobody else occupied any portion of it any more than passing over it: I was working on there at that time; my father worked on his claim, both claims; we prepared affidavits for the work done those years and had them recorded. My father was on his claim at different times, afterwards built a house on it and lived in it and I occupied the cabin some. During November and December, 1898, and the first part of 1899 I was occupying those premises, both claims, I was on there with four or five men at work all the time, part of the time on one and part of the time on the other.

Examination of witness by Mr. BADGER, attorney for intervenor:

The WITNESS: I am acquainted with J. W. Fewel, the intervenor in this case; I first saw him on the day before the 22nd of December, 1898, the 21st.

The COURT: Which is his 20?

Mr. BADGER: It is the south half of the northwest quarter of the northeast quarter of section 20, T. 19 S., R. 15 E.

The WITNESS: I was with Mr. Fewel on the 22nd day of December, I believe it was the 22nd, it was right there in December, on the day the location was made by Mr. Fewel; I was with him at the time the location was made, it was in the evening, December 22nd, 1898, some time about 11 o'clock at night. We made six locations that night, but confining myself now to the south half of the northwest quarter of the northeast quarter—we left Mr. Lavelle's
136 cabin that night and went up around by the northeast quarter of the northwest quarter and around there and went over

there to the northwest corner of the northeast quarter; from there we came back around by where the old derrick is and around up over the hill there to the corner, the southeast corner of his claim, to the south half of the northwest quarter of the northeast quarter of section 20, and there we placed this notice at the southeast corner of the south half of the northwest quarter of the northeast quarter of section 20; there was a monument and stake there; with reference to this corner of the claim we posted this notice just a few feet to the northwest of the corner, about four or five feet, such a matter, well inside, the notice was posted on a stake like those others I have described, board on a stake and notice nailed on it. I saw the notice that was posted there. (Certified copy of location notice exhibited to witness—Intervenor's Exhibit 1.) The date and name and name of the claim and description of the land are the same as that posted upon the ground. We didn't go to any other point on this particular claim that night. The next day, in the morning sometime, 10 or 11 o'clock, maybe a little earlier than that, on the 23rd of December, 1898, we came around down by the "Blue Goose" well and onto that corner, the southwest corner, and I pointed that corner out to Mr. Fewel, there was a mark there, a stake about 18 or 20 inches high, an inch and a half stake; I pointed that out to Mr. Fewel and we went right down by it; we went down by the second well of the Home Company's and by their tank house and down by a well
137 and I showed Mr. Fewel the next corner, the northwest corner of the "Boomer" claim, of this claim, there was a stake there. We were around the wells looking around, and then I went back to father's cabin. That covers the four corners of this claim; I have never seen but two stakes on the west line of that claim and those two stakes were at the two corners; on the east line, there was one corner on the east line where there was no stake; that is the northeast corner of the claim; we placed a stake there, and at the southeast corner we posted the notice. At the time this location was made there had been a discovery of oil upon that ground to my knowledge, there had been a well bored there and oil struck in the well.

Cross-examination:

Mr. COLDWELL: We will remember in talking now, when we talk about the "Boomer" claim and "Fewel" claim, we mean this claim you helped Fewel locate that night.

The WITNESS: This Fewel claim is north of my father's claim; it is not the 20 acres immediately north, there is a twenty between. Upon this claim located by Mr. Fewel that night, at that time, there was only one well upon that claim, called the Home Company No. 2, bored by the Home Company. They were working at the well off and on. I went there at 11 o'clock at night because Mr. Fewel asked me to. I located other claims that night. I believe there were three producing wells at that time. I didn't make the six locations, Mr. Fewel made them. There were flowing wells upon

three of them. I was with Mr. Fewel as a witness and to show him these places. Mr. Fewel was living in Visalia at that time.
138 He came up there and I made his acquaintance after he came, a day or two before that. He didn't tell me what he wanted me to go there for, he came up there to lease those claims of ours. The notice of location was put on the southeast corner of the "Boomer" claim, a monument was already there, four rocks, I think. The notice was not put upon these rocks, it was on the stake, four or five feet from the rocks. I didn't know who put those rocks there. From that point I came around to my father's cabin, to the northwest corner of my father's claim.

We did nothing toward locating this "Boomer" claim that night of December 22nd, excepting putting up this notice, I showed him the corner and he drove the stake. Mr. Fewel left the claim with me. I was there next on the "Boomer" claim the next morning at 10 or 11 o'clock, maybe a little before; was with Mr. Fewel.

Q. At what particular point of this "Boomer" claim did you first strike it?

A. We were along the west edge of it, west side; at the southwest and northwest corners we were at the southwest corner first; there I showed Mr. Fewel the southwest corner stake of the "Boomer" claim. There was an inch and a half Oregon pine stake there, I don't know when nor by whom it was put there, it was a surveyor's stake; it was put there for the purpose of marking the corner of the 20 I suppose, because in chaining out that line some time before that it was just ten chains north of my father's northwest
139 corner; from that point we went north on that line until we came close to the next corner and I showed it to him.

I am one of the defendants in this case, am the H. T. Chrisman referred to; I am a son of A. Y. Chrisman; I was upon this northeast quarter in December, 1896, at different times. I was over there some time about the first and along the middle. I was there to inspect the ground, the northeast quarter of section 20, 19—15. I was there alone part of the time and there with my father part of the time and with my brother part of the time; I wanted to inspect it to see if anything had been done on it, if any assessment work had been done; I had heard, had been told there was a location notice placed there in 1895 and that it would become vacant the 31st of December and no assessment work was done and I was there for the purpose of seeing if it had been done or was going to be done.

I saw Mr. Barieau near there on the 31st. At the time I was down at Mr. Lavelle's cabin; not so very far from this place; it is possibly nearly a quarter of a mile where I saw him; he was not on the land when I saw him. When I went there on the afternoon of the 31st of December I saw a notice there posted by Mr. Barieau. It was about 15 or 18 feet from the southeast corner of the northeast quarter. That notice covered this location afterwards made by me on the morning of the first. When we went up there at one o'clock in the morning we went from Mr. Lavelle's cabin on the southeast

quarter across to the northeast quarter, my father made his location first, his was the first location made that night; I don't know
140 that mine was the second because Mr. Fearon and my father and the rest separated from us and we went and made ours the crowd separated then; at one o'clock according to our watches we separated at the southwest corner of my father's claim, just as soon as we nailed up his notice; Mr. Lavelle and Mr. McQuiddy and myself then came back around the way we came, back to the northwest corner of my claim and the three of us located our claim, my father stayed with Mr. Fearon and the rest of the crowd there; we came to the southwest corner of the claim located by me. After that we went back to Mr. Lavelle's cabin. The next morning we again visited the ground for the purpose of surveying it, staking it; my father and the elder Mr. Fearon were with —; we first surveyed my father's claim; we surveyed it with a chain that I made; after getting the two claims surveyed we went around the quarter section to see if anything had been done and see if any location notice had been put up or anything of the kind. It had been somewhat of a custom over there to locate pieces of land in quarter sections, it had been done considerable anyway and we thought the whole quarter might have been located by somebody that night or morning, and we went around to see what had been done in the way of locating. I found a notice at the northwest corner locating the whole quarter section signed by Mr. Miller and others. I first engaged in the oil business at 1 o'clock January 1st, 1897. That was my first experience in the oil business. I had visited the wells a few times. I did not see any other notice there at that corner that morning.
141 I discovered oil there before this time; I was there prospecting; there was a spring of water there oozing out in different places; the first time I became acquainted with it was about the 1st of December, 1896, I saw the spring about twice between the first of December and the first of January, I saw it at that time and on the 31st of December; along the gulch there in several different places water was coming out and two or three places this oil was on it. I was somewhat acquainted with the oil they were getting over there and around there in different places in the mountains. It had considerable resemblance and in fact was that and I called it oil; I did not see much, the pools it was on it covered, as for size of those pools, one of them was three or four feet long, and it had some width, probably a couple of feet, others were smaller; these places were covered with a scum of oil generally; I saw the oil was on the water.

Q. On how much water, the surface of all the water contained in the pools?

A. On some of them it was, some of the smaller ones, and possibly on those, it covered at different times it covered it more than others. The ground was not stained in any way. On some of these ledges the oily stuff was oozing out, it was damp, it was oozing out, oily stuff, out of the ledges that was there. I brought some of the water

and oily stuff down and had Mr. Lavelle test it. Mr. Lavelle is something of a chemist and I wanted to know its constituents, I think I did that the first trip I made there, sometime about the first of December. I brought it out of the pool, not out of
142 the bottom of the pool; didn't dig down into the bottom of the pool; the pool was a couple or three inches deep. I never brought the dirt, I brought the water and oily stuff that was there, the water and oily stuff mixed. I dipped a bottle in and let it run in. I picked the bottle up there, carried it up, or had it in my pockets, I don't remember. It might have been a can I filled up, I don't remember. I don't remember where I picked it up. I picked it up on that day but I don't know what time. I don't know whether it was on the claim or off the claim. I don't know whether it was a sardine or oyster can, I think it was a bottle, but I wouldn't say sure. I wouldn't say that was the first time I was there. I probably said that, but I changed that. That was an immaterial matter and it was simply a little something of my own curiosity I did that. I can't say whether it was the first or second time that I was there; I don't know how far from the pool I got this bottle or can. It might have been a bottle, or something of the kind I had in my pocket. I can't say whether or not I picked up this bottle or can for the express purpose of getting some of this oil. I can't say for what purpose I picked up the bottle or can. This well that had the oil on it was right at the extreme southeast corner of that claim of mine; it run off of it down on 21, run off the northeast quarter of section 20 onto section 21; it was not far from the corner. One of the pools was 10 or 15 or 20 feet from the corner; the springs were along in the gulch and the gulch run within 15 or 20 feet of this corner.

143 A. Y. CHRISMAN (one of defendants), sworn for defendants and intervenor, testified in substance as follows:

I am one of the defendants in this case, am the father of the last witness. I was born in the State of Arkansas. I am acquainted with the two twenties in dispute in this case known as the Chrisman claims, in section 20, northeast quarter of section 20. I am acquainted with that location; I have been over the whole quarter a number of times; I was over that quarter in the year 1895; I don't think I was on the northeast quarter of section 20 in '96 until December of that year. I know there is a derrick at the northwest corner of the northeast quarter of section 20. There was no derrick blown down near the northwest corner of the northeast quarter of section 20 in 1897, not when I was there in the early part of 1897. There was no derrick there in December, 1896. During December, 1896, when I was around there near the northwest corner of the northeast quarter of section 20 (witness is shown spot on diagram where derrick is said to have been and where the debris of derrick is now claimed to be) I did not see any derrick there or any evidence of any derrick; I was there to see anything that might have

been there in the shape of a derrick or work there; that was my business there; that is what I went there for, with that purpose in view. It was some time in the latter part of April, 1897, when I first saw a derrick there or about there, it was just off a little to the southeast of the northwest corner of the northeast quarter in a little bit of a gulch that comes in there.

144 On December 31st, 1896, I visited the two particular twenties claimed by my boy and myself, got there some time about four o'clock in the afternoon; my son and Major McQuiddy and Mr. Lavelle went over there with me. We looked over the ground to see if there was any work being done—if there was any notice had been posted. I found a notice on the southeast corner of the northeast quarter. At or near the corner I found a bit of a monument with a stake in it, and just above the corner, probably 18 or 20 feet, I might say not more than 15 feet, there was a notice there purporting to be posted by Mr. Barieau. We went from there right across the quarter section over to the southwest corner of the northeast quarter, there we found a bit of a monument, stake there at that corner. That corner is just in the head of a little canyon running up from the west, the canyon does, and the corner is situated probably 18 or 20 feet down in the canyon, coming up on the level with the ground around. It would be impossible for me to stand on the porch or around the house of Mr. Canfield and see that corner. I can't tell what other men can do. I couldn't see the corner that far.

Up to December 31st, 1896, during my observations up to the time that I posted the notice I wasn't able to find any mining work that had been done on that quarter section at all, and I went there to look for that thing.

We again visited those two claims about midnight, my son and Mr. McQuiddy and Mr. Lavelle and Mr. Fearon went along with me, if my memory serves me right; we went over to the

145 center corner of the section—southwest corner of the northeast quarter; we stopped until one o'clock and I posted my notice, one o'clock the morning of January 1st, 1897; I had the notice in duplicate, I put one on a board and drove it up in the southwest corner of the northeast quarter—drove a stake up with a board on and the notice tacked on the board; after doing that I sent the other copy to the recorder's office here in Fresno.

(Copy of notice of location of placer mining claim, certified by the recorder of Fresno county, covering the south half of the southwest quarter of the northeast quarter of section 20, township 19 south, range 15 east, Mt. D. B. & M., in Fresno county, California, claim to be known as the "Bee Hive placer mining claim," located January 1st, 1897, at 1 o'clock a. m., signed by A. Y. Chrisman, filed for record January 9th, 1897, and recorded in vol. "K" of mining claims, page 437, Fresno County Records, is offered and received in evidence, and marked Defendants' Exhibit No. 7.)

The WITNESS: After the boy posted the notice there he went up

on the line some 40 or 50 rods east and drove a stake in the ground with his notice on it, posting the filing on the southeast 20 of the south half of the northeast quarter, east of the middle of the south line of the northeast quarter in question.

We next visited those claims about 9 o'clock January 1st, the same morning; we chained off the ground and drove stakes, intermediate stakes between stakes that we found on the ground already,
146 and erected some monuments. My son and Mr. Fearon went up with me the next morning, we came right over to the southwest corner of the northeast quarter; we found the corner, lot of rocks, there had been some piled up, and a stake there, we built that corner up somewhat, and chained north 10 chains, we found a stake there, lot of rocks scattered around and we erected a monument there; we put up some stakes between those two points, they were made of oak wood half an inch or three quarters in diameter, put them four rods apart, they projected about 6 or 8 inches above the top of the ground. After we had finished that last corner we came back to the southwest corner and chained east 20 chains; our measurements came out within about six feet of what seemed to have been an established corner there by someone; we then went over to the southeast corner of the northeast quarter and chained back and we adopted that corner as the division corner between the two of us, the one that had been there before; we straightened it up, left it in good condition, about 18 inches high; besides the rock there was a large stake in the corner, the stake was about an inch and a half or two inches square and about two feet high, counting the rock and stake together, stake about two feet high and rocks up around it came within 5 or 6 inches of the top of the stake. That is a pretty good description of all the corners we made with the exception of the northeast corner of my boy's claim, he put up a mound of rocks there that was two feet high, probably higher than that, with a different stake in it and a piece of board. Between my boy's claim and my claim and between the southwest cor-
147 ner and the middle corner we put stakes every four rods. Then from the middle corner after chaining back, we chained then north ten chains and set down one of our stakes there, and then we went down to my northwest corner and chained up there and then we went over to the northeast corner and chained back again, came back there from the northeast corner and established a corner there and built a mound of rock. We put stakes every four rods between the corner we adopted on the south line and the corner on the north line between our claims. After establishing that corner in the middle of the north line of mine and boy's claim, the 40 acres, we went diagonally across to the northwest corner of the northeast quarter, we went diagonally across from our center corner up to that corner.

The first corner we established was at the southwest corner of my claim; the second corner we established was in the middle of the south line; the third corner we established was on the southeast

corner of my son's claim. We chained from the southeast corner of the northeast quarter back to the center and then we adopted that monument of a stake and rocks at our corner and chained then across north 10 chains and then we built a mound of rocks there and left a stake to run to; then we came back, went to the southeast corner and chained north and established a monument there on the east line, established the northeast corner of my son's claim. After establishing those corners we went across to the northwest corner of
the northeast quarter and looked around there to see what
148 might have been done there. We found a bit of a monument
on the corner and a notice posted there, it purported to be the Miller notice; we went east then to the northeast corner of the section, what had the appearance of being the northeast corner, found a pile of rocks there, mound of rocks, it looked to be an old mound; from there we went south down to the east line of the northeast quarter, down to the southeast corner again.

I have been occupying those two twenties since then, since January 1st, 1897, and my son has been there a portion of the time. I did work there during December, 1897, and during January and February, 1898, and 1899; my son and myself were working on the claims, both of them, during the year 1899, January, our assessment work this year; we did work there during the year 1897, and during the year 1898, both claims, and made affidavits of the work done and sent them in for record. During December, 1898, and the first part of 1899, I was working on both of those claims with my son. I built a house on my claim in November, 1898, and moved into it.

Before placing the notice there, mining location, I made an examination as to the presence of any petroleum or oil on these two claims. Near the east line of the northeast quarter there is a gulch comes down there and there is a little oil seeps out with the water and comes out in that gulch there; in relation to my boy's claim that would be just inside the southeast corner of his claim, would be on his claim. I made a discovery on my claim near the north line,
inside of my claim, in January, 1897, after I had posted the
149 notice; before I posted my notice I noticed strong evidences
of oil there on my claim, black shale cropping out in places.

When I was there again on the 4th of January, 1897, I again saw the Barieau notice, it was then where I first saw it, about 17 or 18 feet from the immediate southeast corner of the northeast quarter.

(No cross-examination.)

THOMAS J. MCQUIDDY, sworn for defendants and intervenor, testified in substance as follows:

MR. COLDWELL: As to the facts constituting the locations of the Chrismans, we don't propose to call any testimony to rebut that. We will stipulate that this witness will testify that the stakes were placed at the time and in the place that the witnesses A. Y. Chris-

man and H. T. Chrisman testify that they were placed, and we will agree that he will testify to the posting of the notices, the Chrisman notices, at the time and place as testified by H. T. Chrisman and A. Y. Chrisman.

The WITNESS: I was in the vicinity of what is known as Oil City in '97 and the latter end of '96. I have known that country since 1889. I have been over the northeast quarter of section 20 several times. In December, 1896, I was in that vicinity; was in that neighborhood on the 31st of December, 1896, and was upon that particular northeast quarter on that day; went diagonally across the quarter section from the southeast corner over to Oil City, coming out in sight of the northwest corner of northeast quarter. On that afternoon I saw at the southeast corner of that quarter a notice there, Mr. Barieau's notice, as we call it; I don't remember
150 any other names except Mr. Barieau's name, A. Barieau. I never saw it after reading it there; I read it at that time.

I never saw any work or evidence of work being done upon that northeast quarter of section 20 up to the 31st of December, 1896, and saw no work going on there on that day; after the 31st day of December, 1896, some time early in 1897, I saw a derrick on that quarter; it was, I would say, three hundred feet, maybe four hundred feet, from the northwest corner of that quarter; that was the first derrick I ever saw erected on that quarter; the course I took in going diagonally across the northeast quarter on the 31st of December, 1896, would take me from where the derrick was afterwards erected perhaps two or three hundred feet; I think my course would have been so that I could have seen it if it had been there at that time; that first derrick that was erected appeared to me to be rather a low derrick, not more than 40 or 50 feet high, the first one I saw there. There was a derrick blown down there since that time, but I am not positive whether it was that derrick or some other one; there have been several derricks built on that quarter since that time.

I was there in that vicinity the greater portion of December, 1896, and saw no work or excavations whatever of any kind upon the northeast quarter in December, 1896. I didn't see any work going on on the northeast quarter. I was there doing assessment work; my assessment work was being done on the southeast quarter, but I had to go up to Oil City for water to water our stock frequently and to get water to use; while there at the watering place we can
151 see the greater portion of the northeast quarter; we can see the west half of it plainest from Oil City, and of the west half we can see the northern portion plainest from there. I couldn't say how many trips I made up there in December, 1896; I was up there every few days, sometimes every day for several days, and sometimes two days between trips up.

Cross-examination:

I am not interested in this case against the Chrismans. I located a claim on the same day that Chrisman did, but on the southeast quarter.

M. M. LAVELLE, sworn for defendants and intervenor, testified in substance as follows:

Mr. METSON: Gentlemen, will you make the same admissions with reference to Mr. Lavelle that you did with reference to Major McQuiddy?

Mr. COLDWELL: The admission is that Mr. Lavelle will give the same testimony as that given by H. T. Chrisman and A. Y. Chrisman in reference to the time and place of putting the stakes and posting the notices on the two Chrisman claims, as that given by the two Chrismans.

The WITNESS: I reside at present in the Coalinga district; I am familiar with the northeast quarter of section 20, being the section in dispute in these actions; I have known that section since 1889; I was living right upon section 20 in December, 1896, on the southeast quarter; I was frequently on the northeast quarter during the year 1896; I saw no work of any kind being carried on there by any person during the year 1896, everything was in place
152 just the same as it was when I first came in there in 1889. If there had been any excavating or road making or derricks built or other work carried on on the northeast quarter of this section 20 during the year 1896 I would have seen it. The first time I saw a derrick erected on this northeast quarter, it must be some time between February and March, 1897; it was after, of course, it was after the Chrisman locations that I saw them put up the derrick, the first derrick that was ever put up on the northeast quarter; it was in a gulch right opposite the Canfield wells, where the Canfield wells was bored; or other ways, to make it more—this is right opposite where the pumping jack is pumping away up in the gulch. There is where they put up the first derrick. I think it was Frank Barrett that they said put up the derrick.

Q. Now, state with reference to the northwest corner of this northeast quarter, if you can, to the court; give it as near as you can with reference to that point.

A. The northwest corner of the—the northeast corner you mean?

Q. I speak with reference to Oil City, the northwest corner of the northeast quarter.

A. That corner will join 19, will it not? Oh, I know, that is the northwest quarter, but——

Q. Northwest of the northeast—that would be the center line of the section?

A. Oh yes, the center line of the section; yes, I was on there the first of January.

Q. Well, now, I want to locate that point with reference to this first derrick for the court's satisfaction.

153 A. Well, then, it would be probably north of east from the center. It would be kind of—yes, it would be north, north of east I think. Let me see—yes—I think the derrick would be east of north, for the derrick was built in the gulch.

The COURT: Was the derrick built on the east side of the northeast quarter or on the west side of the northeast quarter?

A. It was built on the east side of the northeast quarter—let me see, that would be the line that runs between the northwest and the northeast, if I remember. I am not acquainted with those——

Mr. METSON: Mr. Lavelle, look here at the blackboard. Assume that this is the north line of that section.

A. Yes, sir.

Q. And assume that this would be the east line, this the west line of the section; this would bisect the section, this would be the center of the section. Now, assume these to be the Chrisman locations there.

A. Young Chrisman commenced——

Q. Oil City over in this section.

A. Yes, that is the northwest quarter.

Q. What I want to show to the court is about the point where the first derrick was erected by any person at all.

A. The first derrick that was erected was erected in the gulch, and I think that that would lay from the center stake here of the section where I saw Chrisman place a notice. I think it was east, yes, it would lay east of north, where they put up the derrick in that gulch, and I think that that would lay from the center stake here of the section where I saw Chrisman place a notice, it

154 would lay east of north, where they put up the derrick in that gulch, probably nearly half a mile from the center stake.

I have been doing considerable work over in that country from time to time since 1889; I generally went up to Mr. Canfield's for my water for household and living purposes; went up there about twice a week; I was upon the northeast quarter several times in December, 1896, but I would not go near the northeast quarter coming around to get water at Canfield's, but I could see it opposite Mr. Canfield's place of business; I could see where this derrick, if there was a derrick there, where the derrick was built; I could see that frequently from where I got the water.

(No cross-examination.)

(Declaration of intention of Alphiloque Barieau to become a citizen of the United States, dated July 12th, 1877, filed and recorded in Book "A," Naturalization of Foreigners, records of Fresno county, California, page 82, is offered and received in evidence.)

The following affidavits of H. T. Chrisman and A. Y. Chrisman, and the certificate of Geo. W. Stewart, register of the U. S. land office at Visalia, California, are offered and received in evidence, to-wit:

"STATE OF CALIFORNIA, } ss:
County of Kings, }

H. T. Chrisman, being first duly sworn, deposes and says:

That he is a citizen of the United States and the owner of the following described mining claim, to-wit: the south half of the southeast quarter of the northeast quarter of section twenty
155 (20). township nineteen (19) south, range fifteen (15) of M. D. B. & M., the same being a placer mining claim known as the Paradise placer mining claim, and being situated in the county of Fresno, State of California.

That he performed and had performed the following labor and work upon the above described mining claim as follows:

Between the first day of January, 1897, and the first day of January, 1899, the building of road which was necessary to gain access to the said mining claim, which road was built through sections twenty-nine, twenty and twenty-one, township nineteen south, range fifteen east, M. D. B. & M., and upon the above mining claim, the value of said work and labor being one hundred dollars ($100.00) and over; and also the running of a tunnel for the development of water to be used upon the above described mining claim for mining purposes, and which work and labor is of the value of one hundred dollars ($100.00) and over.

H. T. CHRISMAN.

Subscribed and sworn to before me this 21st day of January, 1899.

W. R. McQUIDDY,
[NOTARIAL SEAL.] *Notary Public in and for the County of Kings, State of California.*

Endorsed: Filed for record at the request of T. J. McQuiddy Jan. 23, A. D. 1899, at 12 min. past 3 o'clock p. m., and recorded
156 in vol "L" of Miscellaneous, page 45, Fresno county records. J. M. Kerr, recorder, by J. E. Hughes, deputy recorder.

Marked Defendant's Exhibit No. 7. Filed May 5, 1899. G. W. Cartwright, clerk, by J. S. Pugh, deputy."

"STATE OF CALIFORNIA, } ss:
County of Kings, }

A. Y. Chrisman, being first duly sworn, deposes and says:

I am and all the times hereinafter mentioned have been a citizen of the United States and resident of the county of Fresno, State of California, and the owner of that certain mining claim or location known as the Bee Hive placer mining claim, situated in the county of Fresno, State of California, and more particularly described as follows, to-wit: Commencing at the center of section 20, in township

19 south, range 15 east, Mt. D. B. & M.; running thence east eighty rods to a stake in a mound of rock; thence north forty rods to a stake in a mound of rock; thence west eighty rods to a stake in a mound of rock; thence south forty rods to the place of beginning; being the south half of the southwest quarter of the northeast quarter of section 20 aforesaid, according to legal subdivision of the same; that the said mining location was made on the 1st day of January, 1897.

That between the 31st day of December, 1897, and the first day of January, 1899, I, the owner of said mining claim, performed or caused to be performed upon said mining claim, the following described work:

Nine days of labor upon a road located upon said claim
157 and adjoining lands for the purpose of access and transportation to and from said claim; forty-two days' work in driving a tunnel upon land adjacent to said mining claim for the purpose of developing a supply of water for use in operating steam machinery upon said Bee Hive mining claim. That the value of said work was $100.00 and more.

That I made upon the Bee Hive mining claim the following improvements, to-wit: I built thereon a miner's cabin or house, and that the cost of value of said house was, for lumber and other materials $45.37, and for labor in putting up the same $12.50 That the total value of the work done upon said mining claim and for the purpose of improving and working the same, and of the improvements made there during the year 1898 is more than one hundred and fifty-seven and 81–100 dollars.

A. Y. CHRISMAN.

Subscribed and sworn to before me this twenty-fifth day of January, 1899.

W. R. McQUIDDY,
Notary Public in and for the County
[NOTARIAL SEAL.] *of Kings, State of California.*

Endorsed: 719. Filed for record at the request of W. R. McQuiddy, Jan'y 26, A. D. 1899, at 10 min. past 4 o'clock p. m. and recorded in vol. "L" of Miscellaneous, page 49 *et seq.*, Fresno county records. J. M. Kerr, recorder, by J. B Daly, deputy recorder."

Marked Defendant's Exhibit No. 8. Filed May 5, 1899.
158 G. W. Cartwright, clerk, by J. S. Pugh, deputy.

"UNITED STATES LAND OFFICE,
VISALIA, CALIF., *May* 3, 1899.

I hereby certify that the records of my office show that George L. Dinely made homestead entry No. 9501 of the N. E. ¼ of sec. 20, T. 19 S., R. 15 E., M. D. M., Oct. 23, 1896; that said entry was cancelled by relinquishment Dec. 17, 1896; that State selection No.

4208, embracing said N. E. ¼ of sec. 20, T. 19 S., R. 15 E., M. D. M., was presented Dec. 17, 1896, sent to the General Land Office for approval Dec. 18, 1896, and relinquished as to said N. E. ¼ sec. 20, T. 19 S., R. 15 E. M. D. M., Feb. 21, 1896.

No part of said N. E. ¼ of said section 20 has been patented.

The State of California had previously presented selection No. 3684 for all of sec. 20, T. 19 S., R. 15 E., M. D. M.; said selection was cancelled by Commissioner's letter "K" of Sept. 30, 1895.

GEO. W. STEWART, *Register.*

Endorsed: Defendant's Exhibit No. 9. Filed May 5th, 1899. G. W. Cartwright, clerk, by J. S. Pugh, deputy."

E. O. MILLER, recalled for defendants and intervenor, testified in substance as follows:

Mr. METSON:

Q. Have you a deed from James E. Campbell of any portion of the northeast quarter of section 20?

A. No, sir; not in my possession.

159 Q. Certain?

A. No sir.

Q. Do you know where there is any deed?

A. I do not.

Q. Did you ever see one?

A. I did not.

Mr. METSON: We move that the testimony of the gentleman be stricken out, if the court please, with reference to any deed having been made of the placer mining claim purported to have been located on the 14th of June, 1895, James E. Campbell being one of the locators. I understand this witness testified there was such a deed.

Mr. COLDWELL: Certainly there was a stipulation of such a deed right in open court by Mr. McQuiddy. There was an express stipulation that Mr. Miller was the successor and holder of all the rights and title and interest in and to this property under and by virtue of the Barrett location in 1895.

The COURT: I think that was a stipulation made here.

Mr. METSON: Well, may it please the court, we don't understand that is the fact. If it was the fact it was made under a misapprehension, and we would ask that the record be corrected in that respect.

Mr. CORY: Most certainly we object to that. We had a witness here from Palo Alto and he has gone—we don't know where he is——

Mr. METSON: If you will state what that witness would have sworn to we may agree the witness so testified.

The COURT: I don't feel inclined to set aside a stipula-
160 tion when the parties come into court and make a stipulation.

Mr. METSON: We understand now there never was any such deed.

The COURT: I think you ought to have known whether there was or not before you made the stipulation, you had the same opportunity to find out then.

Mr. SHORT: It was a voluntary admission; we didn't ask it.

The COURT: Well, there is nothing before the court; I will deny the motion to strike out.

Mr. METSON:

Q. Have you any deed from any of the other locators, Mr. Miller, in your possession?

A. I have none of those deeds.

Mr. HARRIS: We object that this evidence under the stipulation that has been entered into here is incompetent, irrelevant and immaterial. We suppose it is for the same object as the other question.

Mr. HINDS: We would like to see that stipulation. Does the court remember a stipulation of that character?

The COURT: Yes.

Mr. HARRIS: Of course; Mr. McQuiddy stated it twice.

Mr. METSON: What is the court's ruling?

The COURT: There isn't anything before the court.

Mr. HARRIS: I objected and the court sustained the objection.

Mr. METSON: We take an exception, and take an exception to the other ruling.

Assignment of Errors Nos. 17 *and* 18.

161 Mr. METSON: We ask now to be relieved from any stipulation of that character; if any such stipulation was made it was made under a misapprehension of the facts. We would be willing to submit to any ruling or burden the court may place us under with reference to putting the testimony in such shape as would correspond with the facts, and if counsel on the other side have been surprised we agree that they might have a continuance to supply that defect, if they had a witness here to prove anything of that kind. I don't see how they could prove it except in writing. We might agree upon that witness's testimony.

Mr. SHORT: Well, we certainly object to anything of that kind. The stipulation didn't come from us. It was voluntary on the part of the defense in this case, to which we acceded.

Mr. COLDWELL: In direct line with the allegations of their amended answer.

Mr. METSON: Well, we ask leave to withdraw that part of the defense.

The COURT: Well, I think I will deny your application and you can take an exception.

Mr. METSON: We take an exception.

Assignment of Error No. 19.

Mr. METSON: If the court please, our position is that there is an error about any such stipulation having been entered into, and, of course, we want to be placed in the record fairly and squarely that there was no such stipulation and then we will have the court's ruling upon this matter.

The COURT: I don't know whether there is a stipulation
162 or not. My understanding is there was such a stipulation. I might have got the stipulation confounded with the opening statement. That might have been the case; I don't know, but my recollection is there is such a stipulation.

Mr. MCQUIDDY: I don't remember making any statement to that effect.

The COURT: I think I will say to you I will trust to my recollection. I hardly think I am mistaken about it, and will hold there was a stipulation of that kind.

Mr. BADGER: If the court please, the intervenor now asks permission of the court to amend his complaint, for the purpose of conforming to the facts as proven, in the following particulars: On line 25, page 5, wherein we allege that on the 30th day of December, 1896, the plaintiff E. O. Miller, made and executed to the United States what purported to be an abandonment of all rights, &c., we desire to amend by making that allegation read "the 29th;" that is the proof.

Mr. SHORT: Subject to all the objections as to the original intervention the date there may be changed.

Mr. BADGER: We also, if the court please, ask permission to amend the complaint in intervention by striking out therefrom the following words on page 5, line 12, and following: "That thereafter, to-wit, on the 24th day of December, 1896, by mesne conveyances, the plaintiff, E. O. Miller, succeeded to the right, title and interest of the locators in and to the said King Petroleum placer mining claim."

Mr. CORY: We most certainly object to that. It is simply
163 a change of front. We have tried this case and the plaintiff and defendant have rested upon the evidence on that matter.

The COURT: Well, I will deny your motion as to that amendment.

Mr. BADGER: We except.

Assignment of Error No. 20.

Mr. MCQUIDDY: If the court please, we would like to make a slight amendment to our answer, on page 5 line 17, so that line 17,

will add these words in line 17: "discovered by said A. Y. Chrisman," and after the end of line 18 add: "said land being at that time, at the time of said location, vacant, public mineral land."

The COURT: You may amend your answer to that extent.

J. W. FEWEL (intervenor), sworn in his own behalf, testified in substance as follows:

I am the intervenor in this case; I was born in Sonoma county, California; am 38 years old and a citizen of the United States. (Paper handed to witness, being certified copy of location notice.) I am the J. W. Fewel named in this notice.

The following notice of location is offered and admitted in evidence, marked Defendant's Exhibit No. 10, to-wit:

"*Notice of Location of Placer Claim.*

Notice is hereby given that the undersigned, a native born citizen of the United States, having complied with the requirements of chapter six of title thirty-two of the Revised Statutes of the
164 United States and the requirements of the legislature of the State of California entitled "An act prescribing the manner of locating claims upon the public domain of the United States, recording notices of location thereon, amending defective locations, and providing for a deposit of district records with county recorders, and prescribing the effect to be given to recordation of notices of location and affidavits of proof. Approved March 27, 1897, has located twenty acres of placer mining ground as hereinafter described under and by virtue of the laws of the United States and of the State of California governing the location, entry and sale of mineral lands on the public domain of the United States.

That the name of this claim is Boomer placer claim.

That the name of the locator is J. W. Fewel.

That the said claim was discovered and located on the 22nd day of Dec., 1898; that the said claim is the S. ½ of the N. W. ¼ of the N. E. ¼ of section 20, T. 19, S., R. 15 E., M. D. B. & M., situated in the county of Fresno, said State of California, and is particularly described as follows, to-wit: Commencing at a stake situated at the S. E. corner of said claim, and being the initial point of this survey, thence west 20 chains to a stake, thence north 10 chains to a stake, thence east 20 chains to a stake, thence south 10 chains to place of beginning, which is further described and distinctly marked on the ground so that its boundaries can be readily traced and said claim identified.

165 This claim is located for the purpose of developing petroleum and other mineral oils.

Dated and posted on the ground this 22 day of Dec., 1898, by

J. W. FEWEL.

Endorsed: Filed for record at the request of Alex Noble, Jan'y 21, A. D. 1899, at 50 min. past 1 o'clock, and recorded in vol. "M" of Mining Claims, page 400, Fresno county records. No. 588. J. M. Kerr, recorder, by J. B. Daly, deputy recorder.

Recorder's Certificate.

STATE OF CALIFORNIA, } ss:
County of Fresno, }

I, J. M. Kerr, recorder in and for said county, do hereby certify the annexed to be a full, true and correct transcript of the record of an instrument, as the same is recorded in my office in Book "M" of Mining Claims, page 400.

In testimony whereof, I have hereunto set my hand and affixed my official seal on this 4 day of May, A. D. 1899.

[SEAL.] J. M. KERR, *Recorder*,
By J. E. HUGHES,
Deputy Recorder."

Offer marked Defendant's Exhibit No. 10. Filed May 5th, 1899. G. W. Cartwright, clerk, by J. S. Pugh, deputy.

The WITNESS: That is a copy of the notice that I placed upon the ground. I made the location on the 22nd of December, 1898; in company with Mr. Chrisman I went to the southeast corner of the south half of the northwest quarter of the northeast quarter of section 20, T. 19 S., R. 15 E., and there erected a stake and
166 posted this notice, or a copy of this notice that is in evidence; in the first place, before going there, I went to the northeast corner of this particular land described and set a stake, then I went to this corner and set another stake and posted a notice and that is all I done on that day. The next day I went around with Mr. Chrisman to the west end of this particular piece of land and he pointed out to me there a stake that purported to be the southwest corner of this particular piece of land; we went from there on up toward the northwest corner of this particular piece of land, and there he pointed out another stake which purported to be the corner of that particular piece of land, and I prepared my notice so that they would—which the notices will show—so that they would show these stakes as my monuments of the claim. In other words I intended to designate these stakes as my monuments and adopt them as my monuments. I posted the notice just inside of the southeast corner of that claim; I prepared the notice and nailed it on a board and nailed the board on a stake and set it up on the territory, just on the inside, only a few feet. From the southeast corner we went to the northwest corner of that particular quarter section of land. I set a couple of stakes and adopted the other stakes; the stakes that

I set were redwood stakes about 20 inches long and probably two to two and a half square. The stakes at the west end that I adopted were pine stakes about an inch and a half square.

I retained a copy of the notice that I placed on the land and recorded it in the recorder's office at this place, had it done, I
167 think it was recorded on the 21st of January. They lost it in the recorder's office by some means or other, so they told me, notified me. I have never been able to get possession of it after it was placed on record.

I did some work on this property along about the 19th to the 20th of February, 1899, within a day or two there, I don't remember the date. I took a couple of men there and went to work to excavating and leveling up on the southeast corner of the property and preparing a place for a derrick, &c.; the purpose of this labor was to comply with the State law of 1897, for developing the mine. I went on the side hill there and cleaned off a place about 22 feet square, dug down on the upper side of the hill probably four or four and a half feet to bring it down to the level; cleaned it off onto the south side; done that for a foundation for a derrick, oil derrick; myself and my companions commenced work a little before 8 o'clock in the morning and worked until about 3 o'clock in the afternoon without any intermission for dinner. The reason why we didn't work all day was that we were ordered off the ground by representatives of the Home Oil Company. We were there at work and these parties came there and asked us what we were doing and we told them what we were doing. They told us we couldn't work there and we argued the question to some extent and they came armed, they had arms with them. The gentleman that done the talking had a six-shooter in his pocket which was very much displayed, and the other gentleman was sitting off on the side of the hill with a gun.
168 We talked the matter over to some extent. Finally he said: "I am going over the hill here and will be back here directly and I don't want to catch you gentlemen here." Of course I asked him who he represented and he told me who he represented, and on the whole we thought it was best, perhaps, to go, from what we learned heretofore and what we knew heretofore. I don't know that I could just state the language. "Of course," he says, "you will not be allowed to work here," and I asked him if he had authority to drive us off and he said he did, and in the meantime I asked him why some of the proprietors or some of the parties interested didn't come. He says "I can get them if you want to see them." I says "You might as well bring them here." He dawdled off over the hill and pretended to be looking for them, I don't know that he was, and he said when he came back they were not in evidence, were not to be found, and he gave us this imperative order, if he found us there, while he didn't say he would do any particular harm, the inference was very strong, if he found us there when he came back it wouldn't be good for us, &c. I have never gone back

on this particular 20 and attempted to do any other work; there are several reasons why. I thought I had gone——

Mr. HARRIS: We object on the ground that it is incompetent, irrelevant and immaterial. He can state what was done.

Mr. BADGER: If the court please, if we can show that these people, agents of the Home Oil Company and Mr. Miller, threatened this man if he came back on the northeast quarter they would
169 kill him, even if our labors didn't go to the extent required by law, it is an excuse for not doing it, and we think we would be permitted to show at this time the reason he didn't go back there and finish them.

The COURT: I suppose he has shown that sufficiently; I think you have shown sufficient reason for not doing more.

The WITNESS: I knew of the discovery of oil upon that ground prior to making the location; of course I didn't actually see it with my own eyes; the discovery of oil had been made. The party I had to locate the lines, assist in the location of the lines, knew of the oil.

Cross-examination:

I am a book-keeper and accountant. I have not been engaged in that business during the last year. I have been following different occupations during the last year. I have done—during the last twelve months I have not followed any definite occupation. I have performed various deeds toward making a livelihood; for instance, I taken the census of Visalia the other day, a few months ago. That took 10 or 12 or 15 days.

I had not been acquainted with that country before I went over there, that was the first trip over there. It was not Johnnie Kerr that run me off, he wasn't down there at that time; it was later that he undertook to run me off, or did when I went back there. The description of my claim, this "Boomer" claim, is the south half of the northwest quarter of the northeast quarter of section 20, township 19 south, range 15 east, M. D. B. & M. It was between 9 and
11 o'clock in the night I located that. Young Mr. Chrisman
170 was with me and Mr. Scott, a surveyor of Visalia, was with me that evening. I know what portion of that northeast quarter I located, so far as I could without absolutely surveying it. I knew from lines that I had run in the vicinity, from lines that I had followed out on that section the day before. I run the—not on that quarter section. I run lines from the southeast corner of section 20 across the south line of 21 and on to 22, and surveyed around on 22. I had a surveyor with me. From the southeast corner of that section the line is well marked and designated, running north along the east line of that section by redwood stakes set there standing up two and a half feet high probably, and the southeast corner of the southeast quarter is very well marked. I had seen the location from the fact that I had come along across the line of the cen-

ter of 21 running east and west showing me this corner, and following that line up that comes from the southeast corner of the section I located the southeast corner of the northeast quarter.

Q. How did you locate the southeast corner of the northeast quarter of the section?

A. Knowing the south——

Q. Didn't you say because you knew where the southeast corner of the section was that you located the southeast corner of the northeast quarter?

A. Yes, sir; and not by doing that altogether, but by following up the lines. The lines are a half a mile apart, but the line runs through the center of section 21, which I had located and which I followed out until it brought the two lines to a right angle. All
171 I knew about the description was what Mr. Chrisman told me. I put my location notice up there between 9 and 11 o'clock at night. The first portion of my location that I went to first was the northeast corner; Mr. Chrisman told me where it was. We went to the northeast corner of that particular piece of land first; I had it located by Mr. Chrisman, he told me where it was; I then went to the southeast corner from the northeast corner. I knew where it was because it was located by Mr. Chrisman. I went to the southwest corner and the northwest corner of my claim the next day, probably about 9 o'clock. The long way of my claim extends east and west, from the east line to the west line it is 20 chains and up the other way it is 10 chains. The young Mr. Chrisman was with me the next day when I went there, he showed me where the southwest corner and the northwest corner of my claim was. I adopted two stakes and set two stakes, one at each corner. The stakes I adopted were on the west end. I hoped to adopt a well there that I discovered. I found on the ground on that 20 acres that I located, at the time I located, derricks and machinery, &c. There was a tank-house, too, I believe; quite a building and a couple of large tanks in it.

Q. Now I will ask you this question, Mr. Fewel: If at the time you made this location you didn't know that the Home Oil Company was in the actual possession and occupation of that territory, and that they had a well on there, and that you saw these numerous buildings and improvements which you have described?

A. I didn't understand that they were in the actual posses-
172 sion. I understand they were in the occupancy; I knew that they had made this well. At the time that I made this location this well that I saw there was the only discovery of oil that I had made, that was my discovery of the oil on the 20 acres.

E. O. MILLER, recalled for intervenor, testified in substance as follows:

Mr. BADGER:

Q. Mr. Miller, did you ever receive a deed from Mr. James E. Campbell as the locator of any of this land in controversy?

Mr. COLDWELL: Objected to as irrelevant and immaterial and in the direct teeth of the stipulation made and entered in the trial of this case, and also seeking to draw out testimony to contradict the allegations of the intervenor's complaint.

(Objection sustained and exception.)

Assignment of Error No. 21.

Mr. BADGER:

Q. Mr. Miller, did you make any other locations over there at that time, with the same locators, in 1896, except the northeast quarter of section 20?

(Objected to on the ground that it is incompetent, irrelevant and immaterial, relates to property other than that in controversy, and does not tend to support the intervenor's complaint.)

Objection sustained and exception.

Assignment of Error No. 22.

Intervenor rests.

EDWARD L. DOHENY, sworn for plaintiff in rebuttal, testified in substance as follows:

173 I am a producer of oil. I have been in the employ of the Southern California Railway Company as oil expert for a period of about three years. I have been interested in the drilling and had charge of the drilling of between 75 and 100 wells. I have made a study of the production of oil, the character of soils and all the matters pertaining to a knowledge of whether land will produce oil or not. I have been engaged in that business since August, 1892. I have inspected the northeast quarter of section 20 in question; I think it was last month I was over and upon that land for the purpose of examining it in regard to its oil producing qualities. I examined in that vicinity certain wells that are producing oil. I went over the territory pretty thoroughly with Mr. Canfield. I went to a point that was pointed out to me there as the southeast corner, I don't know whether it was or not. There was an excavation, a small arroyo shaft about 15 feet deep with some water in it. Just below that, probably 40 or 50 feet, was another excavation in the nature of a cut with some water oozing from it also; the surface there is loose debris, an accumulation of the washings of the hillside. Immediately beneath that loose soil there is an exposure of shale, sandy shale thinly stratified, that has been disturbed from its

original horizontal position, has a dip of about 40 degrees I should judge. The exposure in the shaft shows a dip towards the northeasterly direction in the shaft. I rode to that point on horseback with Mr. Canfield and another gentleman and got off the horse, had my attention called to the shaft by Mr. Canfield, examined
174 the rock in the shaft and about it with the view of determining whether or not I could see any indications of oil in that vicinity. The indications of oil are the exuding of gas from the ground or the accumulation of residuum left after the volatile portions have left the oil. Those are the indications. The only other indications besides those are the oil itself oozing from the ground—oil makes its appearance in the form of gas or the limpid oil itself, or if both or either of those does not appear, there may be some residuum there pointing to the fact of oil having exuded at some former time, and without the volatile portion, leaving a gum or whatever it may be usually prevailing in those countries. When there is any petroleum on the surface of the water the action of the water is to decompose it and produce analine colors, or rainbow colors on the surface of the water. It always does that. That is an invariable test of petroleum. I examined the soil sufficiently to satisfy myself that there was not any oil in the soil.

Mr. METSON: We object to that as not rebuttal and the time is too far distant from the time of location for the purpose of enabling anyone to determine.

Mr. SHORT:

Q. Now state what, if any, indications you found there of oil at that time or having been there?

Mr. METSON: The objection to that is, that the date is too far distant from the time sworn to by the witnesses, not rebuttal and incompetent, and the proper foundation has not been laid.

(Objection overruled and exception.)

Assignment of Error No. 23.

175 A. I found no indications there whatever of oil.

Q. If there had been oil there flowing from the rock or ground at any previous time could you have discovered indications of it?

(Objected to on the same grounds as last above stated, and upon the further ground that the witness cannot give his opinion as to what might have been there two years before; it is not a subject of expert testimony. Objection overruled and exception.)

Assignment of Error No. 24.

C. A. CANFIELD, recalled for plaintiffs in rebuttal, testified in substance as follows:

I am acquainted with the last witness, Mr. Doheny: was with

him over on the northeast quarter at the time he stated and pointed out to him a tunnel or channel, it was on the southeast corner, one of the excavations was about 20 feet from the southeast corner, maybe a little farther. I examined the cut spoken of by Mr. Chrisman and others here. I examined that tunnel particularly the first of this week; I have been on that corner very many times; I was there two years ago, have examined it at different times in the last two years; I have been over that ground as often as once a month probably at that corner for three years and over; I have never seen any indications of oil there, am positive there was not. I was looking to see whether there was any oil or indications of oil at any of these times.

Cross-examination:

I saw no indications of oil, that is all I know about it.

176 I. F. POSTON, sworn for plaintiffs in rebuttal, testified in substance as follows:

I have been interested in this Coalinga oil district since 1895; I am at present a stockholder in the Home Oil Company; I know where the northeast quarter of section 20, T. 19 S., R. 15 E. is; was over in that vicinity in December, 1896, on the east line and west line, also in November, 1896; I have been at the southeast corner of the northeast quarter of that section at various times in the last four years, but more particularly during the last summer, from July probably or August till September we were there and developed water on that corner; my purpose there was to see if there was any indications of oil or any indications of water that we could develop; I know where there is a kind of tunnel some 15 feet from the southeast corner of the northeast quarter; the Home Oil Company made it and I was manager, oversaw the work, it is some 3 or 4 rods from the southeast corner; it was constructed in August or September, 1898; there was no work of any kind done there at the time we did our work; at that time I saw no oil or indications of oil in the vicinity of the southeast corner of the northeast quarter of that section. There was none at all, absolutely none.

(No cross-examination.)

(Defendants are granted leave to amend their amended answer herein, in the 4th paragraph, page 6, lines 9 and 10, to read as follows: "and that a seepage of petroleum or other mineral oil had been discovered by him upon said tract of land prior to the
177 making of said location, said land being then a portion of the public domain of the United States.")

W. F. CHANDLER, sworn for plaintiffs in rebuttal, testified in substance as follows:

I am one of the stockholders of the Home Oil Company, am acquainted with the northeast quarter of section 20; have been down in the vicinity of the southeast corner of that quarter; was down there doing the fore part of December, 1898, and was down there four or five weeks ago; the first time to simply look over the territory, the last time for the purpose of examining the ravine in reference to water; I saw what I call a well, I don't call it a tunnel, it was very close to the southeast corner of this quarter section of land, I can't state positively whether or not it was on this quarter section; I would say it was about four or five or six feet from that corner, very close to the stake that they said was the corner of the section; as I remember, it was an excavation about 4 feet square on top, 9 feet deep, went straight down. I measured the depth of that hole with a piece of timber that was there, and I examined the ground and the ravine both below the well and above it. I made as close an examination as I could. The water was about four feet from the top of the ground in the well, and I went below it to see if the water was seeping from the well. We only had to go a few feet, a rod or such a matter below the well, till we came to ground that was lower than the water was in the well, and I wanted to see if the
178 water was seeping out from this well. I examined the territory quite a distance below the well and then went up the canyon as far as there were any indications of any kind. I had a walking stick and every place I found any soft earth above the well I thrust it down as deep as I could, and I once got down and scraped the earth away with my hands in order to see the amount of water there was in one of them, and it was in order to see whether it was moving or not, and it was trickling slowly over a little rock that I had scraped the earth from. I walked clear to the head of the canyon as far as there were any indications of water at all, and examined it as carefully as I could. I wasn't looking for oil, I was looking for water. I didn't see any signs of any oil or of any ever having been there; I didn't see any symptoms of oil at all.

(No cross-examination.)

Plaintiffs rest.

(Copy of notice of location of petroleum mining claim, certified by recorder of Fresno county, dated June 14th, 1895, covering northeast quarter of section 20, T. 19 S., R. 15 E., in Fresno county California, to be known as the King Petroleum placer mining claim, located by Frank Barrett, K. W. Brown, Jas. L. McLean, James E. Campbell, J. J. Bright, Jas. A. McClurg Sr., Hart H. Barrett and A. Barieau; filed for record July 16, 1895, and recorded in vol. "I" of Mining Claims, page 453, Fresno county records, is offered and received in evidence and marked Defendants' Exhibit No. 6.)

179 The defendants and intervenor specify the following particulars wherein the evidence is insufficient to justify the decision of the court:

I.

The evidence is insufficient to justify the decision that the plaintiff, E. O. Miller, is the owner of the land described in the complaint, in this, to-wit:

(*a.*) The evidence is insufficient to show that on the 31st day of December, 1896, the said land was a part of the public domain of the United States, open to location and exploration under the mining laws of the U. S.

(*b.*) The evidence is insufficient to show that the plaintiff, E. O. Miller, or any of the other persons whose names appear with his upon the location notice dated Dec. 31, 1896, had ever at any time made a discovery of oil or any other mineral upon the said land.

(*c.*) The evidence is insufficient to show that the plaintiff, E. O. Miller, or any of the other persons whose names appear with his upon the location notice dated Dec. 31, 1896, ever marked their location upon the ground so that its boundaries could be readily traced.

(*d.*) The evidence is insufficient to show that the plaintiff, E. O. Miller, or any of the other persons whose names appear with his upon the location notice dated Dec. 31, 1896, were competent to make a mineral location upon the land in controversy.

180 (*e.*) The evidence is insufficient to show that the location attempted to be made by the plaintiff, E. O. Miller, and the other persons whose names appear with his upon the location notice dated December 31, 1896, was made in good faith and for the purpose of developing the mineral in or on the land in controversy.

(*f.*) The evidence is insufficient to show that the conveyance to plaintiff, E. O. Miller, by the other persons whose names appear with his upon the location notice dated December 31, 1896, and which said conveyance was dated July 31, 1897, was made for a good and valuable consideration, or was a transfer made in good faith by said persons.

II.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "II," that the plaintiff, E. O. Miller, is the owner of the land described in the complaint, in this, that the evidence is insufficient to show that on the 31st day of December, 1896, the said land was a part of the public domain of the United States, open to exploration and location under the mining laws of the United States.

III.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "II," that the plaintiff, E. O. Miller, is the owner of the land described in the complaint, in this, that the

evidence insufficient to show that the plaintiff, E. O. Miller, or any of the other persons whose names appear with his upon the
181 location notice dated December 31st, 1896, ever, at any time, made a discovery of oil or any other mineral upon the said land, or any part thereof.

IV.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "II," that the plaintiff, E. O. Miller, is the owner of the land described in the complaint, in this, that the evidence is insufficient to show that the plaintiff, E. O. Miller, or any of the other persons whose names appear with his upon the location notice dated December 31st, 1896, ever marked their location on the ground so that its boundaries could be readily traced, or that said location was marked upon the ground so that its boundaries could be readily traced by any other person on behalf or for the benefit of the persons named in said location notice, or in pursuance of said location.

V.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "II," that the plaintiff, E. O. Miller, is the owner of the land described in the complaint, in this, that the evidence is insufficient to show that the plaintiff, E. O. Miller, and the persons whose names appear with his upon the location notice dated December 31st, 1896, or either or any of them, were competent to make a mineral location upon the land described in the complaint.

VI.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "II," that the plaintiff, E. O.
182 Miller, is the owner of the land described in the complaint, in this, that the evidence is insufficient to show that the location attempted to be made on December 31st, 1896, was made in good faith.

VII.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "II," that the plaintiff, E. O. Miller, is the owner of the land described in the complaint, in this, that the evidence is insufficient to show that the conveyance to plaintiff, E. O. Miller, by the other persons whose names appear with his upon the location notice dated December 31st, 1896, which said conveyance was dated July 31st, 1897, was made for a good and valuable consideration or was a conveyance made in good faith.

VIII.

The evidence is insufficient to justify the decision of the court as set forth in finding numbered "III," that the plaintiff, The Home

Oil Company, at the commencement of this action was, and ever since has been, and now is, in the actual possession of the same (lands described in the complaint) and every part thereof, in this:

(*a.*) That the evidence is insufficient to show that the said plaintiff was, at the commencement of the action, or at any time since, in the occupation of those portions of the lands described in the complaint located by the defendants on the 1st day of January, 1897.

(*b.*) That the evidence is insufficient to show that said
183 plaintiff had, at the commencement of this action, or at any time since, the right to the occupancy or possession of any of the lands described in the complaint.

IX.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "V," that the claims of said defendants are without any right, and that said defendants have no estate, right, title or interest whatever in said land or premises, or any part thereof, in this, to-wit:

(*a.*) That the evidence is insufficient to show that on the 1st day of January, 1897, the said land was not a part of the public domain of the United States, open to exploration and location under the mining laws of the United States;

(*b.*) That the evidence is insufficient to show that each of said defendants, respectively, did not, on or before the 1st day of January, 1897, make a discovery of petroleum or other mineral oil upon the respective locations made by them on said day;

(*c.*) The evidence is insufficient to show that each of the defendants, respectively, did not, on the 1st day of January, 1897, mark their respective locations on the ground so that the boundaries thereof could be readily traced;

(*d.*) The evidence is insufficient to show that each of the defendants was not competent to make his respective location, or that the same was not made in good faith.

X.

The evidence is insufficient to justify the decision of the
184 court set forth in finding numbered "VI," that the lands described in the complaint was, on the 31st day of December, 1896, a portion of the public domain of the United States, open to exploration and location for mining purposes under the laws of the United States.

XI.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "VIII," that the said parties therein mentioned did, on the 31st day of December, 1896, as an association of persons, make a mineral location upon the lands described in the complaint, by then and there posting upon the ground so claimed

by them a notice containing a description of the lands so claimed by them, and the names of them, the said locators, and, by then and there marking their said location on the ground so that the boundaries thereof could be readily traced, in this, to-wit:

(*a.*) That the evidence is insufficient to show that there was ever any agreement or contract of association or association of or among said parties for the purpose of making said or any mineral location;

(*b.*) That the evidence is insufficient to show that said parties, or any, or either of them, did, on said date, or at any other time, mark said attempted location on the ground so that the boundaries thereof could be readily traced, or that the same was done by any one in their behalf or for their benefit, or in pursuance of said attempted location.

XII.

185 The evidence is insufficient to justify the decision of the court set forth in finding numbered "IX," in this, to-wit:

(*a.*) That the evidence is insufficient to show that on the 31st day of July, 1897, the parties therein named, for a good and valuable consideration, conveyed unto the plaintiff, E. O. Miller, the lands described in said complaint.

(*b.*) The evidence is insufficient to show that the plaintiff, The Home Oil Company, did, on September 17th, 1897, or at any other time, go into the immediate, or any, possession of all of the property described in the complaint.

(*c.*) The evidence is insufficient to show that the said plaintiff, The Home Oil Company, was, on the 17th day of September, 1897, or at any time since has been, in the exclusive or any occupancy of the lands described in the complaint, or had the right to the occupancy or possession of any of the lands described in the complaint.

XIII.

The evidence is insufficient to justify the decision of the court as set forth in finding numbered "XI" in the particulars as hereinbefore set forth in specification "VIII," and specification "XI (*b*)," to which reference is hereby made.

XIV.

The evidence is insufficient to justify the decision of the court as set forth in finding numbered "XII," that on the 1st day of January, 1897, the land therein described was not open to exploration and location, or exploration or location for mining purposes under the laws of the United States.

186 XV.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XV," that the said defendant, A. Y

Chrisman, never, at any time, discovered a seepage of petroleum, or other mineral oil, upon said land, or any part thereof.

XVI.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XV," that the defendant, H. T. Chrisman, never discovered a seepage of petroleum, or other mineral oil, upon said land, or any part thereof.

XVII.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XV," that the only discovery of petroleum, or any other fluid product upon said lands, or any part thereof, is the discovery made by the plaintiff, The Home Oil Company.

XVIII.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XVII," that on the 1st day of January, 1897, no part of the land described therein was public mineral land, or open to exploration or location for mining purposes.

XIX.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XVII," that the land described therein was, on January 1st, 1897, in the possession of the parties
187 therein named, under and by virtue of the location therein mentioned, or at all.

XX.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XVIII," in this, to-wit:

(*a.*) The evidence is insufficient to show that the said defendants did not make their respective locations in good faith;

(*b.*) The evidence is insufficient to show that each of said defendants did not enter into the possession of his respective location, and the whole thereof, for the purpose of working and mining thereon, on the 1st day of January, 1897, or upon any other date.

(*c.*) The evidence is insufficient to show that each of said defendants has not, since the 1st day of January, 1897, done and performed upon his respective location, such work and labor, and made such improvements thereon as is required by the laws of the United States or of the State of California.

(*d.*) The evidence is insufficient to show that each of said defendants has not been, since the 1st day of January, 1897, or is not now in, and entitled to, the exclusive possession of the respective tracts of lands located by them on said 1st day of January, 1897.

XXI.

That the evidence is insufficient to justify the decision of the court set forth in finding "XIX," in this, to-wit:

188 (*a.*) That the evidence is insufficient to show that the claims of said plaintiffs, and each of them, is not without right;

(*b.*) That the evidence is insufficient to show that the claims of said plaintiffs, and each of them, is good and valid;

(*c.*) That the evidence is insufficient to show that the said plaintiffs have, and each of them has, an estate, right, title, claim and interest in and to the lands in controversy.

XXII.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XIX," that "said plaintiffs have, and "each of them has, an estate, right, title, claim and interest in and "to said tract of land (the lands in controversy) and to the whole "thereof," in the particulars set forth in specifications hereof numbered "I," "II," "III," "IV," "V," "VI," and "VII," to which reference is hereby made.

XXIII.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XX," that the location made on June 14th, 1895, by the persons named in said finding upon the land therein described was a "pretended" location of said lands.

XXIV.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XX," that on or about the 24th day of December, 1896, the said persons named in said finding ex-

189 ecuted and delivered to the Producers' and Consumers' Oil Company, a corporation, a deed, conveying to said company all the interest, claim and title in and to said tract of land which the said persons, or any of them, had or claimed to have.

XXV.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XX," that on or about the 24th day of December, 1896, the Producers' and Consumers' Oil Company made, executed and delivered to E. O. Miller, one of the plaintiffs herein, a quitclaim deed conveying and quitclaiming unto said E. O. Miller, all the right, title, claim and interest of said Producers' and Consumers' Oil Company to the lands described in said finding, in this, that the evidence is insufficient to show that said pretended conveyance by said company was ever ratified by the stockholders thereof representing two-thirds, or any, of the capital stock of said corporation.

XXVI.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XX," that "on the 31st day of December, 1896, the said E. O. Miller, by his written declaration, abandoned and relinquished and released unto the United States of America all right in and to said tracts of land (lands described in complaint) acquired by him from said Producers' and Consumers' Oil Company and its grantors," in this, to-wit:

(*a.*) The evidence is insufficient to show that the plaintiff,
190 E. O. Miller, at the time of the pretended abandonment, was the owner of, or had any right, title, interest in or to, or possession of, the land described in the complaint;

(*b.*) The evidence is insufficient to show that the plaintiff, E. O. Miller, intended to relinquish or abandon any right in said land, or was moved by any intention to abandon, surrender, relinquish, disclaim, cede or give up any right or interest in said land;

(*c.*) That the evidence is insufficient to show that the plaintiff, E. O. Miller, in attempting to make said abandonment was not pressed by duty, necessity or utility to himself;

(*d.*) The evidence is insufficient to show that said plaintiff, E. O. Miller, at the time he attempted to make said abandonment desired no longer to hold or possess said land;

(*e.*) The evidence is insufficient to show that the said plaintiff, E. O. Miller, at the time he attempted to make said abandonment was without any desire that a particular person or persons should possess said land;

(*f.*) That the evidence is insufficient to show that when said plaintiff, E. O Miller, attempted to make said abandonment there was a concurrence of the act of leaving the said land vacant so that it might be appropriated by the next comer, and the intention of not returning thereto.

XXVII.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XXIII," in this, to wit:

191 (*a.*) That the evidence is insufficient to show that the plaintiff, E. O. Miller, did not enter into an agreement with the persons and for the purposes mentioned and set forth in paragraph "II" of the "third further and separate defense" contained in defendants' second amended answer;

(*b.*) That the evidence is insufficient to show that the transfer of the "King Petroleum placer mining claim" was for a good consideration and made in good faith as set forth in paragraph "III" of the "third further and separate defense" contained in defendants' second amended answer;

(*c.*) That the evidence is insufficient to show that the said E. O. Miller did not procure one George L. Dinely to make a homestead entry upon the land described in the complaint for the use and

benefit of said E. O. Miller, and thereafter procure a relinquishment thereof;

(*d.*) That the evidence is insufficient to show that said E. O. Miller did not procure the State of California to make indemnity selection of the lands described in the complaint, and thereafter procure one Ernest L. Smith to make application to purchase the same on the 17th day of December, 1896, for the use and benefit of said E. O. Miller, and on the 14th day of February, 1898, procure the relinquishment of said application to purchase, and thereafter procure the relinquishment of said State selection;

(*e.*) That the evidence is insufficient to show that the said plaintiff,
E. O. Miller, did not, for his own use and benefit, on the 31st
192 day of December, 1896, procure the persons whose names appear with his on the location notice dated on said day to make a location on said lands for his (Miller's) own use and benefit;

(*f.*) That the evidence is insufficient to show that there was any privity or agreement among the persons whose names appear on said location notice, or that said persons consented that their names be placed thereon;

(*g.*) The evidence is insufficient to show that the location referred to of December 31st, 1896, was made in good faith; was not an attempt at relocation by original locators; was not made for the purpose of avoiding the assessment work for the year 1896 on said location; was not made in pursuance, and in accordance with, an agreement and design to secure more lands under the mining laws of the United States than said laws permit an individual or an association of individuals to secure, and that said claim was not contiguous to other claims located on the 31st day of December, 1896, by the same parties.

XXVIII.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XXIV," that the intervenor, J. W. Fewel, is not now the owner and has never been the owner of the land described in said finding, and that the claim of said intervenor thereto is without any right or foundation whatever, in this, to-wit:

(*a.*) That the evidence is insufficient to show that on the
193 22nd day of December, 1898, said land was not a part of the public domain of the United States, open to exploration and location for mining purposes under the laws of the United States;

(*b.*) That the evidence is insufficient to show that said intervenor did not, on or before December 22nd, 1898, make a discovery of petroleum, or other mineral oil upon the location made by him on said date;

(c.) That the evidence is insufficient to show that said intervenor did not, on December 22nd, 1898, post a notice of mineral location upon said land, in writing, which said notice contained a description of the land claimed therein and thereby, both by metes and reference to the

legal subdivisions of said land, the name of the claim, the name of the locator, the date of the location, the purpose for which the claim was located, and the signature of the locator therein named, and did not thereafter, to-wit, on the 20th day of January, 1899, cause a copy of said notice to be recorded in the office of the county recorder of the county in which said land is situated;

(*d.*) That the evidence is insufficient to show that said intervenor did not properly mark the boundaries of said location on the ground so that the same could be readily traced;

(*e.*) That the evidence is insufficient to show that said intervenor did not, within 60 days after the date of his said location, do and perform work and labor thereon in developing the same to the amount of $10.00.

(*f.*) That the evidence is insufficient to show that said in-
194 tervenor was not competent to make said location or that the same was not made in good faith.

XXIX.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XXVI," that the land described in said finding was not on December 22nd, 1898, open to exploration and location for mining purposes under the laws of the United States.

XXX.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XXVIII," "that the intervenor, "J. W. Fewel, did not, on the 22nd day of December, 1898, or upon "any date, enter upon and locate under and by virtue, or in accord-"ance with the laws of the United States and with the laws of the "State of California regulating the sale and appropriation of the "mineral lands of the United States, any portion of said section 20," in this, to-wit: In the particulars set forth in specification numbered "XXVIII" hereof, to which reference is hereby made.

XXXI.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XXVIII," that the intervenor did not, on December 22, 1898, nor upon any day, mark the boundaries of his said claim on the ground so that the same could be readily traced, and did not on said or any day mark said boundaries in any manner whatever, nor within the time limited by law.

195 XXXIII.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XXVIII," that said intervenor did not at any time perform labor upon his claim in an amount in excess of the sum of $10.00 or in any other amount.

XXXIV.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XXIX," in this, to-wit: that the evidence is insufficient to show that said section 20 was not, on the 22nd day of December, 1898, surveyed land of the United States, and that the claim of said intervenor was not located thereon in such manner that its exterior boundaries conformed to the legal subdivision of said section.

XXXV.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XXX," in this, to-wit: in the particulars set forth in specification numbered "XXVIII" hereof, to which reference is hereby made.

XXXVI.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XXXI," in this, to-wit:

(*a.*) That the evidence is insufficient to show that the claim of the plaintiffs to the land referred to in said finding is with right or founded in law or in equity;

(*b.*) That the evidence is insufficient to show that the
196 claim of said plaintiff to said land is good or valid.

XXXVII.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XXXII," in this, to-wit:

(*a.*) That the evidence is insufficient to show that the land mentioned in said finding was not, on the 14th day of June, 1895, a portion of the public domain of the United States and open to exploration and location for mining purposes under the laws of the United States;

(*b.*) That the evidence is insufficient to show that A. Barieau, mentioned in said finding, did not, on or before the 14th day of June, 1895, make a discovery of petroleum, or other mineral oil, upon the lands referred to in said finding;

(*c.*) That the evidence is insufficient to show that the persons mentioned in said finding did not mark said location upon the ground so that its boundaries could be readily traced;

(*d.*) That the evidence is insufficient to show that said persons mentioned in said finding were not competent to make a mineral location upon the land described in the complaint on said 14th day of June, 1895;

(*e.*) That the evidence is insufficient to show that the persons mentioned in said finding did not make said location in good faith.

XXXVIII.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XXXIII," that said plaintiff,
197 E. O. Miller, did not, on the 31st day of December, 1896, execute the pretended abandonment mentioned in said finding for the purpose of avoiding the necessity of doing the assessment work as required by the laws of the United States for the year 1896.

XXXIX.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XXXV," in this, to-wit:

(*a.*) That the evidence is insufficient to show that said persons mentioned in said finding made the location mentioned therein in good faith;

(*b.*) That the evidence is insufficient to show that said persons mentioned in said finding, other than plaintiff, E. O. Miller, made the location mentioned therein for their own use and benefit;

(*c.*) That the evidence is insufficient to show that the persons mentioned in said finding, other than said E. O. Miller, did not make said location at the instigation and request of said E. O. Miller, and for his sole use and benefit;

(*d.*) That the evidence is insufficient to show that the said location was not made for the purpose of enabling the said E. O. Miller to hold and acquire a greater area of the mineral lands of the United States than the laws of the United States permits an individual to hold or acquire.

XL.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XXXVI," in this, to-wit:

(*a.*) The evidence is insufficient to show that the persons
198 named in said finding did not make the location therein referred to in pursuance of and in accordance with a conspiracy, collusion and concerted design to secure and appropriate the lands therein referred to by avoiding the requirements of the laws of the United States;

(*b.*) The evidence is insufficient to show that the location mentioned in said finding was not a relocation by original locators;

(*c.*) The evidence is insufficient to show that the location in said finding referred to was made at a time when the land included therein was open to exploration and location and was not premature and invalid and of no force or effect;

(*d.*) The evidence is insufficient to show that the location mentioned in said finding was marked upon the ground so that the boundaries thereof could be readily traced.

XLI.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XXXVII," in this, to-wit:

(*a.*) That the evidence is insufficient to show that the persons whose names appear upon the location notice dated December 31st, 1896, did not, upon said day, contrary to the laws of the United States, make other locations which were contiguous to the lands mentioned in the complaint;

(*b.*) The evidence is insufficient to show that said persons did not attempt to locate and hold a greater area of the mineral lands of the United States than is or was permitted to be located or held
199 by an individual or an association of individuals.

XLII.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XXXVIII," in this, to-wit:

(*a.*) The evidence is insufficient to show that the said E. O. Miller did not procure said George L. Dinely to make a homestead entry upon the lands mentioned in said finding for the benefit of said E. O. Miller;

(*b.*) The evidence is insufficient to show that the said E. O. Miller did not procure said Ernest L. Smith to make an application to the State of California to purchase said lands as indemnity or lieu lands for the use and benefit of said E. O. Miller, and subsequently to secure the abandonment thereof by said State.

XLIII.

The evidence is insufficient to justify the decision of the court set forth in finding numbered "XXXIX," in this, to-wit: the evidence is insufficient to show that the acts of the said plaintiff, E. O. Miller, to-wit, the attempted abandonment made on December 29th, 1896; the re-location attempted December 31st, 1896, for the purpose of avoiding the performance of assessment work for the year 1896; the locating of claims contiguous to the land described in the complaint on December 31st, 1896; the attempt to locate and hold more than 160 acres of the public domain of the United States under the mining laws thereof by one person or association
200 of persons; the procuring one George L. Dinely to make homestead entry on said land for the use and benefit of said E. O. Miller; the procuring of the State of California to select the lands described in the complaint as indemnity lands; the procuring one Ernest L. Smith to make application to purchase said lands from the State of California for the use and benefit of said E. O. Miller; the procuring the relinquishment by the State of its said selection, and procuring a transfer to himself by the State of the persons whose names appear with his upon the location of December 31st, 1896, were not and did not constitute fraud against the United States and against the intervenor.

The defendants and the intervenor here specify the following errors in law occurring at the trial and excepted to by said defendants and intervenor, upon which they will rely in support of their motion for a new trial.

I.

The court erred in overruling the objection to the manner in which the witness E. O. Miller gave his testimony.

II.

The court erred in overruling the objection to the introduction of the lease from E. O. Miller to Frank Barrett, assigned to the Home Oil Company (Pl'ff's Ex. 2).

201 III.

The court erred in denying the motion to strike out from the evidence Plaintiff's Exhibit 1, on the grounds stated in the motion.

IV.

The court erred in overruling the objection to the testimony of the witness W. F. Hall, made upon the grounds stated in the objection.

V.

The court erred in sustaining plaintiff's objection to the following question propounded to the witness W. F. Hall: "Q. Well now I "will ask you when you were over there on the 31st of December, "1896, did you not put up some other notices besides on the northeast "quarter?"

VI.

The court erred in sustaining plaintiff's objection to the following question propounded to the witness W. F. Hall: "Q. What did you do there?"

VII.

The court erred in sustaining plaintiff's objection to the following question propounded to the witness W. F. Hall: "Q. Did you post "a notice in the middle of the section, at the corner common to all "four quarters?"

VIII.

The court erred in sustaining plaintiff's objection to the following question propounded to the witness W. F. Hall: "Q. What I want "to know, what was the intent and purpose between you and Mr. "Miller of making that abandonment?"

202 IX.

The court erred in denying the motion to strike out from the testimony of C. A. Canfield, the testimony in regard to the small stakes, which he saw upon the lines of the land before Mr. Miller made his so-called location.

X.

The court erred in overruling the objection to the introduction in evidence of the affidavit of I. F. Poston as to labor performed on the land in question during the year 1897.

XI.

The court erred in overruling the objection to the introduction in evidence of the affidavit of I. F. Poston as to work done upon the land in question during the year 1898.

XII.

The court erred in denying the motion to strike out the testimony of D. G. Overall and Harry Levison relative to their citizenship.

XIII.

The court erred in overruling the objection to the following question propounded to the witness Chas. H. Smith: "Q. Are you a "citizen of the United States?"

XIV.

The court erred in allowing the admission subject to the objection and exception contained in the foregoing two assignments of error, that L. E. Hall and R. B. Biddle were citizens of the United States.

203 XV.

The court erred in denying the motion for a non-suit.

XVI.

The court erred in sustaining plaintiff's objection to the following question propounded to the witness A. Barieau: "Q. What lands "did it cover?"

XVII.

The court erred in denying the motion to strike out from the evidence a certain stipulation or admission claimed to have been made by defendant's attorney, Mr. McQuiddy.

XVIII.

The court erred in sustaining plaintiff's objection to the question propounded to the witness E. O. Miller, recalled for the defendant, relative to a certain deed made by James E. Campbell of his interest in the land in question under the location of June 14th, 1895.

XIX.

The court erred in refusing leave for defendants to withdraw that part of their defense relative to the matters involved in the two foregoing assignments of error.

XX.

The court erred in denying and refusing intervenor permission to amend his complaint in intervention, by striking out from page 5 thereof, commencing on line 12, the following: "That thereafter,
"to-wit, on the 24th day of December, 1896, by mesne con-
204 "veyances, the plaintiff, E. O. Miller, succeeded to the right,
"title and interest of the locators in and to the said King
"Petroleum placer mining claim."

XXI.

The court erred in sustaining plaintiff's objection to the following question propounded to the witness E. O. Miller, called for intervenor:

Q. Mr. Miller, did you ever receive a deed from Mr. James E. Campbell as locator of any of this land in controversy?"

XXII.

The court erred in sustaining plainttff's objection to the following question propounded to the witness E. O. Miller by the intervenor:

Q. Mr. Miller, did you make any other locations over there at that time, with the same locators, in 1896, except the northeast quarter of section 20?"

XXIII.

The court erred in overruling the objection to the following question propounded to the witness Edward L. Doheny:

"Q. Now state what, if any, indications you found there of oil at that time or having been there."

XXIV.

The court erred in overruling the objection to the following question propounded to the witness Edward L. Doheny:

"Q. If there had been oil there flowing from the rock or ground at any previous time could you have discovered indications of it?"

205 The said defendants and the said intervenor here specify the following particulars wherein the decision of the court and the judgment thereof is against law.

1. The decision of the court whereby it was adjudged that the said plaintiff, E. O. Miller, is the owner of the whole of the land and premises described in the said complaint and is entitled to the possession thereof, and that the said defendants and the said intervenor are not the owners of the said land or of any part thereof, is against law in this, that this is an action to quiet title and one wherein the plaintiff must recover, if at all, on the strength of his own title and not upon the weakness of the defendants' title, or the weakness of any title asserted against his title; and it was clearly proven in evidence that the plaintiff's title to the said land was the weaker title of the two titles asserted in the said action; and said decision is against law for the further reason that the evidence clearly proves that the claim of the plaintiffs in this action to the said premises was based upon a so-called mineral location attempted to be made at a time when the land sought to be located was not a part of the public domain open to exploration and appropriation or location under the laws of the United States, and was therefore void, premature, of no effect and inoperative for any purpose whatever, while the title of the defendants and the intervenor was clearly proven to rest upon a location of the portions of the said land
206 claimed by them respectively made at a time when the land was open to exploration and location and was a part of the public domain, and each of the locations of the said defendants and the said intervenor was made in good faith and for the purpose of acquiring the land appropriated thereby for the purpose of developing the mineral therein, while the so-called location under which the said plaintiff, Miller, claims the said land was not made in good faith, but for speculative purposes, and by the use of "dummies," and not in accordance with the laws of the United States or of the State of California, and the said plaintiffs are not entitled therefore to judgment in the case, and judgment should have been for the defendants and the intervenor herein.

2. The decision of the court declaring and adjudging that neither of the said defendants nor the said intervenor has any right, estate, title, or interest or right of possession whatever in the said portions of the said land described in the said complaint claimed by them respectively, and said defendants and said intervenor are debarred from asserting any claim in or to the said premises or any part thereof adverse to the said plaintiffs or either of them, is against law in this, that it was clearly proven at the trial that the said defendants have an estate, right, title, interest and right of possession in and to the part of the said land claimed by them, and the said intervenor has an estate, right, title, interest and right of possession to that portion of the said land claimed by him, and that the said

defendants and the said intervenor are and were, at all the
207 times they alleged they were, the absolute owners of the respective portions of the said lands claimed by them respectively, as against the said plaintiffs, and both or either of them.

3. The decision of the court awarding costs to the said plaintiffs is against law for the reasons hereinbefore stated.

The said defendants and the said intervenor here specify the following errors upon which they will rely in support of their motion for new trial.

1. The court erred in its conclusion of law numbered "1," which is as follows:

"That the plaintiff, E. O. Miller, is the owner of all that piece and parcel of land situate in the county of Fresno, State of California, and particularly described in the complaint on file herein as against the defendants, A. Y. Chrisman and H. T. Chrisman, and as against the intervenor, J. W. Fewel, and as against all persons claiming or to claim said land or any part thereof. And that the said plaintiff, Home Oil Company, is the lessee of all of said piece and parcel of land under the title of the plaintiff, E. O. Miller, and is entitled to the actual possession of said land, and each and every part thereof, as against the said defendants, A. Y. Chrisman and H. T. Chrisman, or either of them, and as against the said intervenor, J. W. Fewel," to which the said defendants and the said intervenor duly excepted.

208 2. The court erred in its conclusion of law numbered "2," which is as follows:

"That the said plaintiffs are entitled to a decree declaring and adjudging that neither of said defendants, A. Y. Chrisman and H. T. Chrisman, nor the said intervenor, J. W. Fewel, has any estate, right, title or interest, or right of possession whatever, in and to said land and premises, or any part thereof, and forever enjoining and debarring the said defendants, A. Y. Chrisman and H. T. Chrisman, and said intervenor, J. W. Fewel, from asserting any claim in or to said premises, or any part thereof, adverse to the said plaintiffs, or either of them," to which the said defendants and the said intervenor duly excepted.

3. The court erred in its conclusion of law numbered "3," to which the said defendants and the said intervenor duly excepted.

4. The decision is based on findings of fact that do not embrace all or determine all of the material issues of fact raised by the pleadings.

5. The decision is based on findings of facts on matters not embraced within the issues of fact raised by the pleadings.

6. The decision is based on erroneous conclusions of law drawn from findings of facts unsupported and not justified by the evidence.

In order that the foregoing inaccuracies, insufficiencies and errors may remain of record, the defendants and the intervenor propose

this as their statement on motion for a new trial herein, and
209 respectfully ask that the same be settled, allowed and certified by the court.

Dated this 17th day of August, 1899.

W. R. McQUIDDY,
S. J. HINDS,
AUSTIN & JONES, AND
REDDY, CAMPBELL & METSON,
Attorneys for Defendants.
E. O. LARKINS,
U. T. CLOTFELTER, AND
W. S. BADGER, *Attorneys for Intervenor.*

It is hereby stipulated and agreed by and between the attorneys for all of the parties to this action, that the foregoing statement of the case on motion for a new trial, proposed on the part of the defendants and the intervenor, is correct, and the same may be settled, allowed and certified by the court, and may be used by any of said parties, as well on an appeal from an order granting or refusing a new trial, as on the motion for a new trial.

Dated this 22d day of November, 1899.

N. C. COLDWELL,
L. L. CORY,
F. H. SHORT,
M. K. HARRIS, *Attorneys for Plaintiffs.*
W. R. McQUIDDY,
S. J. HINDS,
AUSTIN & JONES, AND
REDDY, CAMPBELL & METSON,
Attorneys for Defendants.
E. O. LARKINS,
U. T. CLOTFELTER, AND
W. S. BADGER, *Attorneys for Intervenor.*

210 Personal service of the foregoing statement of the case on motion for a new trial, and receipt of a copy of the same on the part of the defendants and the intervenor, is hereby admitted this 17th day of August, 1899, reserving all objections and exceptions to same as to time and manner of service of same.

L. L. CORY,
Attorney for Plaintiffs.

I, J. R. Webb, judge of the superior court, do hereby certify that the foregoing statement of the case on motion for a new trial is settled, allowed, and the same is correct.

Witness my hand this 24th day of November, 1899.

J. R. WEBB,
Judge of the Superior Court.

Endorsed: Filed Nov. 24-1899. G. W. Cartwright, clerk. By J. E. Cartwright, dep'y clerk.

Notice of Motion for New Trial.

(Title of Court and Cause.)

To the said plaintiffs and N. C. Coldwell, L. L. Cory, Frank H. Short and M. K. Harris, and J. A. Hannah, attorneys for said plaintiffs:

You and each of you will please take notice that on Friday, the first day of December, 1899, at the court room of department No. 2 of the above court, at the court house in the city of Fresno, 211 county of Fresno, State of California, at the opening of court on that day, or as soon thereafter as counsel can be heard, the said defendants and the intervenor will move the court for an order granting them a new trial of this action.

Said motion will be made upon the statement of the case heretofore prepared, and certified by the court herein.

Said motion will be made and based upon all the grounds stated and set forth in the notices of intention to move for a new trial herein, heretofore served and filed herein by the said defendants and the said intervenor.

W. R. McQUIDDY,
S. J. HINDS,
AUSTIN & JONES, AND
REDDY, CAMPBELL & METSON,
Attorneys for Defendants.
E. O. LARKINS,
U. T. CLOTFELTER, AND
W. S. BADGER, *Attorneys for Intervenor.*

Dated November 25, 1899.

Endorsed: Filed Nov. 25, 1899. G. W. Cartwright, clerk, by J. E. Cartwright, dep'y clerk.

Minute Order.

(Title of Court and Cause.)

FRESNO, CALIFORNIA, *Dec. 1st*, 1899.

It is ordered that the hearing of the motion for a new trial herein be continued to Dec. 8th, 10 a. m.

212 *Minute Order.*

(Title of Court and Cause.)

FRESNO, CALIF., *Dec. 8th*, 1899.

It is ordered that the motion of defendants and intervenor herein for a new trial be, and the same is, hereby denied.

Notice of Appeal.

(Title of Court and Cause.)

You will please take notice that the defendants, A. Y. Chrisman and H. T. Chrisman, and the intervenor, J. W. Fewel, in the above-entitled action, hereby appeal to the supreme court of the State of California from the judgment therein entered in the said superior court on the 24th day of June, 1899, in favor of the plaintiffs in said action, and against the said defendants and the said intervenor, and from the whole thereof, and also from the order denying said defendants' and said intervenor's motion for a new trial, made and entered in the minutes of said superior court on the 8th day of December, 1899.

Dated this 16th day of December, 1899.

W. R. McQUIDDY,
S. J. HINDS,
AUSTIN & JONES, AND
REDDY, CAMPBELL & METSON,
Attorneys for said Defendants.
E. O. LARKINS,
U. T. CLOTFELTER, AND
W. S. BADGER,
Attorneys for said Intervenor.

213 To the said plaintiffs, and to N. C. Coldwell, M. K. Harris, Frank H. Short and L. L. Cory, attorneys for said plaintiffs.

Endorsed: Filed Dec. 19-1899. G. W. Cartwright, clerk by J. E. Cartwright, dep'y clerk.

(Title of Court and Cause.)

STATE OF CALIFORNIA, } ss:
County of Fresno, }

It is hereby stipulated and agreed by and between the attorneys for all of the parties hereto that the foregoing is a full, true and cor-

rect transcript of the judgment roll, minute orders allowing intervention, notice of intention to move for a new trial on the part of defendants, notice of intention to move for a new trial on the part of intervenor, statement on motion for a new trial, motion for a new trial, order denying motion for a new trial, and notice of appeal, in said action; and that for the sake of brevity the words "Title of court and cause" have been used in place and stead of the full title of court and the names of the parties to the action; and the words "Duly verified" in place and stead of the full verification of the pleadings. And we further certify that an undertaking in due form of law has been duly and regularly filed herein to perfect the appeal in this action.

Dated February — 1900.

214

N. C. COLDWELL,
L. L. CORY,
M. K. HARRIS,
FRANK H. SHORT,
Attorneys for Plaintiffs.
W. R. McQUIDDY,
AUSTIN & JONES, AND
REDDY, CAMPBELL & METSON,
Attorneys for Defendants.
E. O. LARKINS,
U. T. CLOTFELTER, AND
W. S. BADGER, *Attorneys for Intervenor.*

215 In the Supreme Court of the State of California.

E. O. MILLER and THE HOME OIL COMPANY, a Corporation, Plaintiff- and Respondents,
vs.
A. Y. CHRISMAN and H. T. CHRISMAN, Defendants and Appellants; J. W. Fewel, Intervenor and Appellant.
S. F. No. 2242.

I, Frank C. Jordan, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of the transcript,—decision—rehearing denied—and dissenting opinion as shown by the records of my office.

Witness my hand and the seal of the court, this 3d day of December, A. D. 1903.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk.*
By OSCAR A. TOLLE, *Deputy.*

[Endorsed:] No. 2242.

216 *Copy.*

Filed Sept. 30, 1903. Frank C. Jordan, Clerk, by R. D. Duke, Deputy.

In Bank.

E. O. MILLER and THE HOME OIL COMPANY, a Corporation, Plaintiffs and Respondents,
vs.
A. Y. CHRISMAN and H. T. CHRISMAN, Defendants and Appellants; J. W. Fewel, Intervenor and Appellant.
} S. F. No. 2242.

This action is to quiet title to the northeast quarter of section 20, township 19 south, range 15 east, Mount Diablo base and meridian, in the county of Fresno, State of California. All parties claim by virtue of locations made under the mineral laws of the United States.

In the year 1895, it is admitted that the land in controversy was a part of the public domain of the United States and open to exploration and location under its mineral laws. Upon the 14th day of June 1895 one A. Bariceau, on behalf of himself and seven others, as associates, went upon the land and posted a location notice. Nothing further was done until the month of January following, when Bariceau went upon the land with a surveyor and marked the boundaries of the location upon the ground. Upon the 24th day of December, 1896, the interests of Bariceau's seven alleged associates passed to E. O. Miller, plaintiff herein, by mesne conveyance. Thereafter, on the 31st of December, 1896, Miller executed a purported abandonment and relinquishment of his right, title and interest to the land in controversy to the United States, and on the same day made a location on behalf of himself and seven associates.

Upon January 1, 1897, the defendants Chrisman made their locations; while upon the 22nd day of December, 1898, more than two months after the commencement of this action, and in the night time, the intervenor, with H. T. Chrisman, entered upon the land and made still another location covering a part of it. After
217 trial the court found in favor of plaintiffs' location against the locations of defendants and the intervenor, and judgment passed accordingly. Defendants and intervenor make common cause upon most of the matters presented upon appeal.

Their contentions are:

1. That the location by Bareau and others upon the 14th of June, 1895, was a valid location which devested the land of its status as part of the public domain, and appropriated it to private claim and dominion until the end of the year 1896.

2. That, therefore, Miller's attempted location upon December 31, 1896, was void because made at a time when there was a valid subsisting location upon the land; because it was not based on a discovery and was not perfected by a subsequent discovery until the rights of other parties attached; because the location was in fact made only by Miller, Hall and Hannah, the other five co-locators being mere dummies, and, finally, because the boundaries of the location were not marked upon the ground so that they could be readily traced.

3. That no assessment work whatsoever having been done upon the land in question during the year 1896, by or on behalf of Bareau and his co-locators, the Bareau location lapsed, and on the first day of January, 1897, the land again became open for exploration and location, and was so open at the time that defendants made their locations upon January 1, 1897; that their locations were and at all times have been valid subsisting locations.

It will thus be noted that none of the appellants claim under the Barieau location, nor contend that they have acquired any of the rights of those locators. It is agreed that if the Barieau location was in all other respects a valid location, it lapsed at the end of the year 1896 by failure to perform the statutory amount of labor. If, however, the Barieau location was not a valid location, as the court finds, then the lands were open to notorious peaceable, and *bona fide* entry by others for the purpose of initiating a new location. The finding of the court, as has been said, were against the validity of the Barieau location.

Without discussing other grounds of objection made to that
218 location, we are satisfied that it was invalid for at least one reason. Barieau and his co-locators did not at the time of their attempted location, nor ever, make any discovery of mineral upon the land. In considering this proposition, it should be said that the mineral upon these lands is oil. Under the act of Congress of 1897, the location of oil claims is governed by the mineral laws of the United States applicable to the location of placer mining claims. The two requirements admittedly essential to the validity of a location such as this, are that the location must be distinctly marked upon the ground so that the boundaries can be readily traced, and that there must be a discovery of minerals within the limits of the land located. (Rev. Stat. U. S. sec. 2324.) Upon the question of discovery the sole evidence is that of Barieau himself. Giving fullest weight to that testimony it amounts to no more than this, that Barieau had walked over the land at the time he posted his notice and had discovered "indications" of petroleum. Specifically, he says that he saw a spring and "the oil comes out and floats over the water in the summer time when it is hot.

In June, 1895, there was a little water with oil and a little oil with water coming out. It was dripping over a rock about two feet high. There was no pool; it was just dripping a little water and oil, not much water." This is all the "discovery" which it is even

pretended was made under the Barieau location, and we think it clear that such testimony does not establish a discovery within the meaning of the law. To constitute a discovery, the law requires something more than conjecture, expectation, hope, or even indications. The geological formation of the country may be such as scientific research and practical experience have shown to be likely to yield oil in paying quantities. Taken with this there may be other surface indications such as seepage of oil. All these things combined may be sufficient to justify the expectation and hope that, upon driving a well to sufficient depth, oil may be discovered, but one and all they do not in and of themselves amount to a discovery.

This view finds support in the Nevada Sierra Oil Co. *v.* Home
219 Oil Co. 98 Fed. Rep. 673, where the circuit court was dealing with this precise question, in regard to this precise piece of land, under these identical circumstances.

While perhaps it would be stating it too broadly to say that no case can be imagined where a surface discovery may be made of oil sufficient to fill the requirements of the statute, yet it is certainly true that no such case has ever been presented to our attention, and that in the nature of things such a case will seldom, if ever, present itself.

Nor does the view which we entertain of the essentials of a valid discovery as applied to oil bearing lands present any points of hardship, but to the contrary we think it to be not alone the only rational one which may be taken under the law, but also, the only interpretation which offers security and protection to the *bona fide* locator. It is to be remembered that it is not essential to the validity of a location that the discovery shall have preceded or shall co-exist with the posting of the notice and demarkation of boundaries. The discovery may be made subsequently, and when made operates to perfect the location against all the world, saving those whose *bona fide* rights have intervened. One who thus in good faith makes his location, remains in possession, and with due diligence prosecutes his work toward a discovery, is fully protected against all forms of forcible, fraudulent, surreptitious or clandestine entries and intrusions upon his possessions. Such entry must always be peaceable, open and above board, and made in good faith, or no right can be founded upon it. Belk *v.* Meager, 104 U. S. 279; Atherton *v.* Fowler, 96 U. S. 513; Nevada Sierra Oil Co. *v.* Home Oil Co. *supra.*) It was just such a peaceable, open entry upon the land that Miller and his associates made upon December 31, 1896.

No discovery had been made under the Barieau location. No work at all had been done to protect it, and in consequence it could not be said that Barieau and his associates were in the actual *bona fide* possession of their claim and developing it under the requirements of the statute.

This being the case it was the right of any person or association of persons to enter peaceably and openly, as was done by Miller and

his associates. Thus having been determined that the in-
220 itiation of the claim of Miller and his associates was founded in the right, there remains to — considered the objections urged against the validity of that location. And first it is insisted that the location is invalid because Miller, prior to his location, but upon the same day, executed an abandonment to the Government of all rights under the Barieau location, and it is contended that this invalidated the location subsequently made, because such pretended abandonment was not made *not* in good faith, but was designed as a fraud upon the United States to evade the performance of the assessment work required by law. But the answer to this is that the court upon sufficient evidence finds against this contention, and, furthermore, as the Barieau location was itself invalid, there was no occasion for an abandonment of it, because there was nothing to abandon. As to other objections made to the validity of the Miller location, it is sufficient to say, without discussing the evidence, that the court was justified in its finding that the requirements of the posting of a sufficient notice and demarkation of boundaries were all complied with in accordance with law. So, too, the evidence warrants the finding of the court that the persons named as co-locators in the Miller location were *bona fide* locators, and that the location was made for the benefit of them all. Likewise, upon sufficient evidence, the court's finding negatives the charge of fraud, collusion and conspiracy upon the part of these locators.

It is disclosed by the evidence that Miller, his associates and lessees remained in possession of land, and with diligence and great expense prosecuted the work of boring wells. This work finally resulted in success, oil was discovered in paying quantities, and the land became extremely valuable. Plaintiffs thus, not only made a discovery, but are the ones of all the alleged locators who have done so. It has been said that it is not necessary that discovery should precede nor co-exist with the posting of notice and the marking of the claim, but that a discovery subsequently made perfects the title except so far as the rights of others may have intervened. This proposition is perhaps too well recognized to require citation
221 of authorities, but reference may be made to 1 Lindley on Mines, sec. 330; Jupiter M. Co. *v.* Bodie C. M. Co. 11 Fed. Rep. 666; North Noonday M. Co. *v.* Orient M. Co. 1 Fed. Rep. 522; Thompson *v.* Spray, 72 Cal. 528; Erwin *v.* Perigo, 93 Fed. Rep. 608; Erhardt *v.* Boaro, 113 U. S. 527; English *v.* Johnson, 17 Cal. 108. The alleged discovery of defendants under their location may be disposed of in a sentence.

It amounted to no more than the pretended discovery made by Barieau. It results, therefore, that between the date of the Miller location and the date of the Miller discovery no rights had intervened, and the possessory title of the holders under the Millers location was justly quieted against the adverse claimants. It is against this, however, still further contended that, notwithstanding the fact that the location on behalf of Miller and his associates embraced 160

acres in common, and notwithstanding the fact that they had driven successful wells upon the different parts of the land, yet, as at the time of the institution of the suit they had not actually driven a well, and discovered oil upon those portions of the quarter section claimed by the defendants, plaintiffs, claim of title is void as to each of those twenty acres upon which actual discovery has not been made. But a location made by an association of persons, by the very terms of the law, is one location covering 160 acres, and not eight locations, each covering twenty acres. The boundaries required to be marked are the boundaries of the 160 acres, and not the boundaries of each seperate twenty acres. The expenditure of $500 before patent issues is an expenditure required upon the whole land, and not an expenditure upon the twenty acre subdivisions thereof, and the only assessment work required is labor to the value of $100 upon the single location and not upon any twenty acre subdivision thereof. Logically, therefore, since in marking boundaries, doing assessment work and expenditure for patent the 160 acres is treated as an entirety under one location, for the purpose of discovery it should be treated in the same manner, and this is the ruling, with some conflict in its earlier decisions, which the Land Office of the United States has finally returned to and settled upon. In the case of Union
222 Oil Co. 25 L. D. 351 it is explicitly declared: "A placer location, if made by an association of persons, may include as much as one hundred and sixty acres. It is nevertheless a single location, and as such only a single discovery is by the statute required to support it." With this declaration we are in full accord.

The claim of intervenor scarcely merits even a passing notice. The record shows that his alleged location was made upon the 22nd day of December, 1898, after the institution of this action, and long after the plaintiffs had sunk their wells and discovered oil. The intervenor knew that at the time of his alleged discovery the Home Oil Company was in the occupancy of the territory. He entered upon the land and located his claim between the hours of nine and eleven o'clock at night. He adopted for his boundaries the existing boundaries, and his discovery consisted in observing the oil which was coming from plaintiffs' well.

Such a fraudulent, surreptitious and clandestine entry upon the possession of another cannot be made the bases of any right. (Atherton *v.* Fowler, 96 U. S. 513.)

It appears that Miller, his co-locators and other successors in interest remained in the actual and undisturbed possession of the entire property from the date of their location until the commencement of this action. It appears further that upon the 31st day of July, 1897, and before any discovery of oil had been made, Miller's associates and co-locators executed to him a deed of all their right, title and interest in the property. Subsequently, and upon the 17th day of September, 1897, Miller executed a lease of the premises, which lease was transferred to the plaintiff, Home Oil Company. The Home Oil Company thereupon took possession of the premises, bored for,

and in the month of October, 1897, struck oil and made the first discovery upon the land in question. Upon this state of facts intervenor contends that the location was invalid; that the effect of the conveyance of his co-locators to Miller before discovery operated as an abandonment by them of their location, and destroyed the validity of the whole location; that the validity of the location thus having been destroyed, the subsequent discovery of oil did not and could not serve to validate it, and at the most could have given
223 Miller, as the sole remaining member of the association, the right to re-locate twenty acres about his discovery. Stating the proposition in a sentence it is this: That where a location has been made by associates, those associates have no right or title which they can convey before the location is perfected by discovery, and their attempt to convey results in an abandonment of their claim, and in the destruction of the whole location. It sufficiently appears from what has heretofore been said, that a location such as this, made by eight associates, is but a single location, each associate having an undivided eighth interest in the whole. It further appears that certain valuable rights become the property of such locators even before discovery. They have the right of possession against all intruders (Garthe *v.* Hart, 73 Cal. 541), and they may defend this possession in the courts. (Richardson *v.* McNulty, 24 Cal. 339.) They have then this right of possession, and with it the right to protect their possession against all intrusions, and to work the land for the valuable minerals it is thought to contain. We cannot perceive why these rights may not in good faith be made the subject of conveyance by the associates as well before as after discovery. There is certainly nothing in the expressed law upon the subject to lead to the view that this cannot be done, and there is much to give countenance to the contrary conviction. Thus the law expressly provides that if one of the co-locators abandons his claim or interest by refusing to bear his proportion of the cost of the assessment work, such abandonment does not, as would be claimed, work the destruction of the whole location, but "his interest in the claim shall become the property of his co-owners who have made the required expenditures. (Rev. Stat. U. S. sec. 2324.) It is to be born in mind that a location, such as this, though it contain 160 acres, is still a single location, a single claim, with undivided interests, covering the whole of it. Any work done upon the claim is done for the benefit of all the co-locators. It is undisputed that when the location has once been perfected, one of the associates may by conveyance acquire all of
224 the rights of his fellows, and we can perceive no reason why the right to prosecute the work and perfect such a location by discovery may not itself be vested in a single one of them. If, instead of conveying, the seven associates had stood idle and refused to contribute their share to the necessary work of developing, and Miller under these circumstances had alone prosecuted the work to a successful discovery, no one could contend, in the face of section 2324 of the Revised Statutes of the United States, but that Miller would

have acquired the rights of all, and would have had a perfected location covering the whole 160 acres. If then, by their abandonment, without a conveyance, Miller would have acquired the right to prosecute the work and perfect the whole location for himself individually, it is impossible to see why a conveyance to him of their right, instead of an abandonment of it by a refusal to join in the work, should effectuate any different result.

For the foregoing reasons the judgment and order appealed from are affirmed.

HENSHAW, *J.*

We concur:
McFARLAND, *J.*
VAN DYKE, *J.*
ANGELLOTTI, *J.*
LORIGAN, *J.*

225 Argued. Due Oct. 30, 1903.

(Copy.)

In the Supreme Court of the State of California. In Bank.

MILLER ET AL. *vs.* CHRISMAN ET AL. } S. F., No. 2242.

By the COURT:

Rehearing denied, October 30, 1903.
Beatty, C. J., dissenting.

Filed Oct. 20, 1903.

FRANK C. JORDAN, *Clerk*,
By I. ERB, *Deputy*.

226 (Copy.)

Filed Oct. 31, 1903. Frank C. Jordan, Clerk, by —— ——, Deputy.

In Bank.

MILLER ET AL., Plaintiffs and Respondents, *v.* CHRISMAN ET AL., Appellants. } S. F., No. 2242.

(OCTOBER 31, 1903.)

I dissent from the order denying a rehearing of this cause. There can be no location of a mining claim before discovery, and there can be no transfer or assignment of a location before the location is

complete. There can, in other words, be no assignment of the right to locate. If, in the expectation of discovery, an association of persons marks the boundary of a placer claim containing twenty acres for each associate, I have no doubt that they will be protected in their possession while they proceed with reasonable diligence to prospect the claim, and that by a discovery they will perfect it; but if some of the associates withdraw before discovery or attempt to assign their claims to those who continue the work of development, those who remain will have no right to a claim greater in the aggregate than they could have taken by an original location.

BEATTY, *C. J.*

227 In the Supreme Court of the State of California. Bank.

E. O. MILLER ET AL., Resp's, *vs.* A. Y. CHRISMAN ET AL., Def'ts; J. W. Fewel, App's.	S. F., No. 2242. On Appeal from the Superior Court in and for the County of Fresno.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by Henshaw J.

We concur; McFarland J., Van Dyke J., Angellotti J., Lorigan J.

Whereupon, it is adjudged and decreed by the court that the judgment and order of the superior court in and for the county of Fresno in the above entitled cause, be and the same are hereby affirmed.

I, Frank C. Jordan, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 30th day of September, 1903, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office, this 5th day of January, A. D. 1904.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk*,
By I. ERB, *Deputy*.

228 [Endorsed:] S. F. No. 2242. In the supreme court, State of California. Remittitur. E. O. Miller *et al.*, resp's, *vs.* A. Y. Chrisman *et al.*, def'ts; J. W. Fewel, app's. Clerk's costs $— Paid by appellant, $12.50 Paid by respondent, $— Total, $12.50 Frank C. Jordan, clerk, by I. Erb, deputy.

229 In the Supreme Court of the State of California.

E. O. MILLER and THE HOME OIL COMPANY (a Corporation), Plaintiffs,
vs.
A. Y. CHRISMAN and H. T. CHRISMAN, Defendants. } S. F., 2242.

I, Frank C. Jordan, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of petition for writ of error and assignments of errors on file and as shown by the records of my office.

Witness my hand and the seal of the court, this 5th day of December, A. D. 1903.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk*,
By OSCAR A. TOLLE, *Deputy*.

230 In the Supreme Court of the State of California.

E. O. MILLER and THE HOME OIL COMPANY (a Corporation), Plaintiffs,
vs.
A. Y. CHRISMAN and H. T. CHRISMAN, Defendants. } S. F. D., No. 2242.

Petition for Writ of Error.

To the Honorable W. H. Beatty, chief justice of the supreme court of the State of California:

Your petitioners, A. Y. Chrisman and H. T. Chrisman, defendants in the above-entitled action, most respectfully show unto your honor that they are defendants in an action brought by plaintiffs in the superior court of Fresno county to quiet title to certain lands in the county of Fresno, State of California, and described as follows, to wit:

The north east quarter of section 20, township 19 south, range 15 east, M. D. B. & M.

That the complaint in said action was filed in the superior court of said county of Fresno, on the 14th day of October, 1898.

That the defendants, your petitioners herein, appeared and filed a joint answer in said action, the defendant A. Y. Chrisman claiming a certain part of said quarter section, and the defendant
231 H. T. Chrisman claiming a certain other part thereof. J. W. Fewell filed a complaint in intervention in said action, claiming title to a certain other part of the quarter section. All of the parties claimed the land under and by virtue of locations alleged by them to have been made thereon under the laws of the United

States regulating the sale and disposition of the mineral lands of the United States.

A judgment was entered in said superior court of the county of Fresno in favor of plaintiffs and against the defendants and against the intervenor. Appeals were taken on the 16th day of December, 1899, by the defendants and by the intervenor from the judgment and also from the order of the court, denying their respective motions for a new trial, to the supreme court of the State of California.

Briefs were filed by all the parties and after argument the said supreme court on the 30th day of September, 1903, affirmed the judgment and decree of the lower court.

Your petitioners, on October 20th, 1903, filed their joint petition for re-hearing in banc but said petition was denied October 30th, 1903.

Your petitioners further respectfully show unto your honor that in said suit and action of E. O. Miller and The Home Oil Company (a corporation), the plaintiffs therein *vs.* A. Y. Chrisman and H. T. Chrisman, as defendants therein, your petitioners, A. Y. Chrisman and H. T. Chrisman specially claimed the title, right, privilege, immunity and authority exercised under the laws of the United States, and particularly and specially under the provisions of chapter VI title XXXII of the Revised Statutes of the United States, regulating and governing the mineral lands and mining resources of the United States, and also under the act of Congress approved February 11, 1897, (29th U. S. Statutes at Large, 526) and by the proceeding in said suit and action, and final judgment and
232 decree of the honorable the supreme court therein was drawn in question, necessarily involved and passed upon the validity of a statute of and authority exercised under the laws of the United States, where a title, right, privilege and immunity was specially claimed by your petitioners in said action, and the decision of the justices of the supreme court which rendered its decision on the 30th day of September, 1903, was and is against the title, right, privilege and immunity specially pleaded, set forth and claimed by your petitioners A. Y. Chrisman and H. T. Chrisman, defendants in said action, under the Revised Statutes of the United States.

Your petitioners being dissatisfied with the said judgment and decree made by the superior court in this suit and action, and with the order of the honorable, the supreme court of the State of California, affirming the judgment and decree appealed from, and feeling aggrieved thereby, most respectfully pray that they be allowed to prosecute a writ of error to the Supreme Court of the United States, in pursuance of the laws of the United States in that behalf made and provided.

Most respectfully,

A. Y. CHRISMAN.
H. T. CHRISMAN.

CAMPBELL, METSON & CAMPBELL,
Att'ys for Appellants and Defendants.

The writ of error above prayed is allowed.
Nov. 7, 1903.

W. H. BEATTY,
Chief Justice of the Supreme Court of State of California.

233 [Endorsed:] No. 2242. In the supreme court of the State of California. E. O. Miller and The Home Oil Company (a corporation), plaintiffs *vs.* A. Y. Chrisman and H. T. Chrisman, defendants. Petition for writ of error Due service of within — admitted this — day of —— 190- —— —— attorney for —. Filed —— — 190- —— —— clerk. By —— —— deputy clerk. Campbell, Metson & Campbell, attorneys for defendants. Rooms 115, 116, 117, 118, 119, 120, 121, 122 Crocker building, San Francisco, Cal.

234 In the Supreme Court of the State of California.

A. Y. CHRISMAN and H. T. CHRISMAN, Defendants and Plaintiffs in Error,
vs.
E. O. MILLER and THE HOME OIL COMPANY (a Corporation), Plaintiffs and Defendants in Error.

Assignment of Errors.

A. Y. Chrisman and H. T. Chrisman, having petitioned the above-named court for an order permitting it to prosecute a writ of error to the honorable, the Supreme Court of the United States from the final judgment made and entered in said cause by the supreme court of the State of California, now make and file with their said petition the following and specify the same as their assignment of errors herein, upon which they will rely for a reversal of said judgment upon said writ.

1. The decision of the court that the location by Barieau and others upon the 14th day of June, 1895 was not a valid location so as to divest the land of its status as part of the public domain.

2. The decision of the court that Barieau in June, 1895, made no discovery of oil.

3. The decision of the court that Miller, his associates and
235 lessees made a valid discovery of oil.

4. The decision of the court that Miller, his associates and lessees are the only ones of all the alleged locators who have made a discovery of oil.

5. The decision of the court that no work had been done to protect the Barieau location, and that Barieau and his associates were not in the actual *bona fide* possession of their claim and did not develop it under the requirements of the statute.

6. The decision of the court that the Barieau location was itself

invalid and therefore there was no occasion for an abandonment of it, because there was nothing to abandon.

7. The decision of the court that the evidence warrants the finding of the lower court that the persons named as co-locators in the *Miller location were bona fide locators and that the location* was made for them all.

8. The decision of the court that between the date of the Miller location and the date of the Miller discovery no rights had intervened and that the possessory title of the holders under the Miller location was justly quieted against the adverse claimants.

9. The decision of the court that in marking boundaries, doing assessment work, the 160 acres is treated as an entirety under one location and for the purpose of discovery should be treated in the same manner.

10. The decision of the court that the Home Oil Company in the month of October, 1897, made the first discovery upon the land in question.

236 11. The decision of the court that the ground attempted to be located by Miller and associates on December 31st, 1896 by the erection of monuments and posting of a notice upon the 31st day of December, 1896, was then, prior thereto or thereafter during the year 1896, open for location, or was public, vacant or unappropriated mineral land of the United States.

12. The decision of the court that upon January 1st, 1897, the tracts upon which the defendants Chrisman located were not vacant, public and unappropriated mineral lands of the United States and open to location by them or any citizens of the United States or those who had declared their intention to become such.

13. The decision of the court that any rights were vested prior to discovery of mineral within the boundaries of the tract of land sought to be located.

14. The decision of the court that any person could by location acquire any rights upon the public domain under the mining laws of the United States, which would give him the right by virtue of one marking or one placer location more than twenty acres in area.

15. The decision of the court that Miller could become vested with the rights of his seven associates in a 160 acre tract attempted to be located under the statutes of the United States as placer mineral ground, it being admitted that there was no discovery of mineral within the boundaries of said 160 acres at any time, and the seven associates attempted to transfer and convey their alleged interests to the remaining one it being admitted and found that there was no discovery until after said seven associates had made said conveyance.

237 16. The decision of the court that the attempted location of said mineral land by Miller and his associates was made in good faith on or about the 31st day of December, 1896, or thereafter in good faith perfected.

17. The decision of the court that the said attempted location

made by Miller and his associates on the 31st day of December, 1896, was not a fraud upon the United States or evading the laws of the United States requiring one hundred dollars' worth of work to be performed annually upon each and every mining location.

18. The decision of the court in permitting the said Miller and his associates to make or attempt a location on the 31st day of December, 1896, it appearing that the attempted abandonment by the said Miller of the Barieau location of June, 1895, was not concurred in by the said Barieau and that said attempted abandonment by Miller was made for the purpose of relocating the same ground in order to evade the statutes of the United States requiring one hundred dollars' worth of work to be done annually on each and every mining location.

19. The court erred in holding that crude petroleum seeping from the ground was not a discovery, and that a seepage was a mere indication of oil.

20. The court erred in holding that the seepage within the twenty acre tracts located by Chrismans and oil exposed in a spring thereon was not a discovery of mineral within the statute.

21. The court erred in holding that one person could locate a placer claim by one location to twenty acres of ground.

238 22. The court erred in holding that any person in one location of placer mining ground could be vested with any rights from seven associates who had attempted to convey alleged rights to him, and thereby give one person the right to own or control by one location as much as one hundred and sixty acres of mineral land.

CAMPBELL, METSON & CAMPBELL,
Attorneys for Plaintiffs in Error.

239 [Endorsed:] No. —. In the supreme court of the State of California. A. Y. Chrisman and H. T. Chrisman, defendants and plaintiffs in error, *vs.* E. O. Miller and The Home Oil Company, (a corporation), plaintiffs and defendants in error. Assignment of errors. Due service of within — admitted this — day of —— 190- —— —— attorney for —. Filed —— — 190- —— —— clerk. By —— —— deputy clerk. Campbell, Metson & Campbell, attorneys for —, rooms 115, 116, 117, 118, 119, 120, 121, 122 Crocker building, San Francisco, Cal.

240 In the Supreme Court of the State of California.

A. Y. Chrisman and H. T. Chrisman, Plaintiffs in Error,
vs.
E. O. Miller and The Home Oil Company (a Corporation), Defendants in Error.

I, Frank C. Jordan, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is the

original copy of the writ of error and citation on file in this office and as shown by the records of my office.

Witness my hand and the seal of the court, this 5th day of December, A. D. 1903.

[Seal Supreme Court of California.]

FRANK C. JORDAN *Clerk*,
By OSCAR A. TOLLE, *Deputy*.

241 A. Y. CHRISMAN and H. T. CHRISMAN, Plaintiffs in Error,
vs.
E. O. MILLER and THE HOME OIL COMPANY (a Corporation), Defendants in Error.

UNITED STATES OF AMERICA, *ss*:

The President of the United States to E. O. Miller and The Home Oil Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, on the eighth day of January, 1904, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein A. Y. Chrisman and H. T. Chrisman, are plaintiffs in error, to show cause, if any there be why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Beatty, chief justice of the supreme court of the State of California, this 16th day of November, 1903.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Service of the citation and receipt of a copy of writ of error mentioned therein acknowledged this 19th day of November, 1903.

L. L. CORY,
M. K. HARRIS,
Att'ys for Defendants.

242 [Endorsed:] S. F. No. 2242 In the supreme court of the State of California. A. Y. Chrisman, *et al.*, plaintiffs in error, *vs.* E. O. Miller, *et al.*, defendants in error. Citation. Filed Nov. 20 1903 Frank C. Jordan, clerk by R. D. Duke deputy. Due service of within — admitted this — day of —— 190– —— —— attorney for — Filed —— — 190– —— —— clerk. By —— —— deputy clerk. Campbell, Metson & Campbell, attorneys for plaintiffs in error, rooms 115, 116, 117, 118, 119, 120, 121, 122 Crocker building, San Francisco, Cal. [Across face in red pencil:] Return to.

243 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable justices of the supreme court of the State of California, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of the plea which is in the said supreme court of the State of California, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in that certain suit between E. O. Miller and The Home Oil Company, a corporation, defendants in error, and A. Y. Chrisman and H. T. Chrisman, plaintiffs in error, being the suit numbered in your records as San Francisco, number 2242, wherein was drawn in question the construction of a statute of the United States and also an act of Congress and the decision was against the title, right privilege and immunity specially set up or claimed under such statute and act of Congress, a manifest error hath happened to the great damage of the said A. Y. Chrisman and H. T. Chrisman, as by their complaint and answer appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid *said* in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washingon on the eighth day of January, 1904, in the said Supreme Court to be then and there held, that the record and
244 proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of November, in the year of our Lord one thousand nine hundred and three.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN,
Clerk U. S. Circuit Court, Northern District of California.

Allowed this 14th day of November 1903.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

245 [Endorsed:] United States of America. A. Y. Chrisman and H. T. Chrisman, plaintiffs in error, vs. E. O. Miller and The Home Oil Company (a corporation), defendants in error. Writ of error. Filed Nov. 16, 1903 Frank C. Jordan, clerk By I. Erb deputy. Campbell, Metson & Campbell attorneys for plaintiffs in error.

246 In the Supreme Court of the State of California.

A. Y. CHRISMAN and H. T. CHRISMAN, Plaintiffs in Error,
vs.
E. O. MILLER and THE HOME OIL COMPANY (a Corporation), Defendants in Error.

Know all men by these presents: That we, A. Y. Chrisman and H. T. Chrisman, as principals, and William H. Metson and Joseph C. Campbell, as sureties, are held and firmly bound unto the People of the State of California in the full and just sum of one thousand (1,000) dollars; for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 14th day of November, 1903.

Whereas, the action above entitled was originally brought in the superior court of the State of California in and for the county of Fresno, and,

Whereas, said superior court of the county of Fresno rendered and entered its decision in said action, and thereupon on or about June 24th, 1901, caused its final judgment in said action to be rendered and entered awarding to plaintiffs E. O. Miller and The Home Oil Company, a corporation (defendants in error) a judgment therein against defendants, A. Y. Chrisman, and H. T. Chrisman,
247 (plaintiffs in error) but upon which said judgment plaintiffs in error perfected an appeal to the supreme court of the State of California on the 16th day of December, 1899; and,

Whereas, on the perfecting of said appeal, said A. Y. Chrisman and H. T. Chrisman executed in due form and caused to be properly filed its undertaking on appeal in the sum of three hundred dollars ($300) conditioned for the payment of costs and damages that might be awarded to said plaintiff upon such appeal or dismissal thereof, which undertaking remains in full force and virtue; and,

Whereas, by such appeal all of the said judgment in the said superior court of the county of Fresno, State of California, was by the said supreme court of the State of California in all respects affirmed; and,

Whereas, the petition of A. Y. Chrisman and H. T. Chrisman, plaintiffs in error, was, on the 7th day of November duly presented to the chief justice of the supreme court of the State of California, praying for the allowance of a writ of error to the Supreme Court of the United States herein; and,

Whereas, said petition has been allowed by the chief justice of the supreme court of the State of California, and an order has been made that upon plaintiffs in error filing a bond with proper sureties, in the sum of one thousand (1000) dollars, conditioned as required by law, such bond shall stand as for a supersedeas bond herein, operating as

a stay of execution of the said judgment until the final determination of said writ of error by the Supreme Court of the United States.

Now the condition of this obligation is such that if the said A. Y. Chrisman and H. T. Chrisman shall prosecute said writ of
248 error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise it shall remain in full force and effect.

A. Y. CHRISMAN.
H. T. CHRISMAN.
JOSEPH C. CAMPBELL.
WM. H. METSON.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

William H. Metson and Joseph C. Campbell, being duly and separately sworn, each for himself, and not one for the other, says:

I am one of the sureties upon the above undertaking and reside in the city and county of San Francisco, State of California, and am a householder therein. I am worth the sum of five thousand (5,000) dollars in property situate in said State of California over and above all my just debts and liabilities, exclusive of property exempt from execution.

WM. H. METSON.
JOSEPH C. CAMPBELL.

Subscribed and sworn to before me this 14th day of November, 1903.

[SEAL.] GEORGE E. HATTON,
Notary Public in and for the City and County of San Francisco, State of California.

249 In the Supreme Court of the State of California.

A. Y. CHRISMAN and H. T. CHRISMAN, Plaintiffs in Error,
vs.
E. O. MILLER and THE HOME OIL COMPANY (a Corporation), Defendants in Error.

The within bond is hereby approved.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Nov. 14, 1903.

250 [Endorsed:] No. —. In the supreme court of the State of California. A. Y. Chrisman et al., plaintiffs in error, *vs.* E. O. Miller *et al.*, defendants in error. Bond. Due service of within — admitted this — day of —— 190– —— —— attorney for —— —— Filed —— — 190– —— —— clerk, by —— —— deputy clerk. Campbell, Metson & Campbell, attorneys for plaintiffs in error, rooms 115, 116, 117, 118, 119, 120, 121, 122 Crocker building, San Francisco, Cal.

251 In the Supreme Court of the State of California.

A. Y. Chrisman and H. T. Chrisman, Plaintiffs in Error,
vs.
E. O. Miller and The Home Oil Company (a Corporation), Defendants in Error.

Order Fixing Bond.

Upon the petition of A. Y. Chrisman and H. T. Chrisman, plaintiffs in error, it is ordered that in order to stay execution of judgment pending the writ of error herein, plaintiffs in error shall be required to give bond for costs and just damages for delay herein, as required by law and the rules of the Supreme Court of the United States, in the penal sum of one thousand ($1,000.00) dollars and said bond shall operate as a supersedeas bond, staying execution of said judgment pending the writ of error aforesaid.

November 14th, 1903.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

252 [Endorsed:] No. —. In the supreme court of the State of California. —— —— plaintiff *vs.* —— —— defendant. Order fixing bond. Due service of within — admitted this — day of —— 190– —— —— attorney for —— —— Filed —— — 190– —— —— clerk, by —— —— deputy clerk. Campbell, Metson & Campbell, attorneys for —— —— rooms 115, 116, 117, 118, 119, 120, 121, 122 Crocker building, San Francisco, Cal.

253 In the Supreme Court of the State of California.

A. Y. Chrisman and H. T. Chrisman, Plaintiffs in Error,
vs.
E. O. Miller & The Home Oil Company (a Corporation), Defendants in Error.
} S. F., 2242.

I, Geo. W. Root, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true

and correct copy of an order fixing bond and the bond on file as shown by the records of my office.

Witness my hand and the seal of the court, this 7th day of December, A. D. 1903.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk*,
By OSCAR A. TOLLE, *Deputy*.

Endorsed on cover: File No. 19,193. California supreme court. Term No. 171. A. Y. Chrisman and H. T. Chrisman, plaintiffs in error, *vs.* E. O. Miller and The Home Oil Company. Filed January 11th, 1904. File No. 19,193.

IN THE

Supreme Court of the United States

A. Y. CHRISMAN AND
H. T. CHRISMAN,
Plaintiffs in Error,

vs.

E. O. MILLER AND
THE HOME OIL COMPANY,
Defendants in Error.

SPECIFICATIONS OF ERROR.

The Specifications of Error upon which plaintiffs in error rely are found at page 131 of the Transcript, and are as follows:

1. The decision of the Court that the location by Barieau and others, upon the 14th day of June, 1895, was not a valid location so as to divest the land of its status as part of the public domain.

2. The decision of the Court that Barieau in June, 1895, made no discovery of oil.

3. The decision of the Court that Miller, his associates and lessees made a valid discovery of oil.

4. The decision of the Court that Miller, his associates and lessees are the only ones of all the alleged locators who have made a discovery of oil.

5. The decision of the Court that no work had been done to protect the Barieau location, and that Barieau and his associates were not in the actual *bona fide* possession of their claim and did not develop it under the requirements of the Statute.

6. The decision of the Court that the Barieau location was itself invalid and therefore there was no occasion for an abandonment of it, because there was nothing to abandon.

7. The decision of the Court that the evidence warrants the finding of the lower Court that the persons named as co-locators in the Miller location were *bona fide* locators and that the location was made for them all.

8. The decision of the Court that between the date of the Miller location and the date of the Miller discovery no rights had intervened and that the possessory title of the holders under the Miller location was justly quieted against the adverse claimants.

9. The decision of the Court that in marking boundaries, doing assessment work, the 160 acres is treated as an entirety under one location and for the purpose of discovery should be treated in the same manner.

10. The decision of the Court that The Home Oil

Company in the month of October, 1897, made the first discovery upon the land in question.

11. The decision of the Court that the ground attempted to be located by Miller and associates on December 31st, 1896, by the erection of monuments and posting of a notice upon the 31st day of December, 1896, was then, prior thereto or thereafter during the year 1896, open for location, or was public, vacant or unappropriated mineral land of the United States.

12. The decision of the Court that upon January 1st, 1897, the tracts upon which the defendants Chrisman located were not vacant, public and unappropriated mineral lands of the United States and open to location by them or any citizens of the United States or those who had declared their intention to become such.

13. The decision of the Court that any rights were vested prior to the discovery of mineral within the boundaries of the tract of land sought to be located.

14. The decision of the Court that any person could by location acquire any rights upon the public domain under the mining laws of the United States, which would give him the right by virtue of one marking or one placer location more than twenty acres in area.

15. The decision of the Court that Miller could become vested with the rights of his seven associates

in a 160 acre tract attempted to be located under the Statutes of the United States as placer mineral ground, it being admitted that there was no discovery of mineral within the boundaries of said 160 acres at any time, and that the seven associates attempted to transfer and convey their alleged interests to the remaining one, and it being admitted and found that there was no discovery until after said seven associates had made said conveyance.

16. The decision of the Court that the attempted location of said mineral land by Miller and his associates was made in good faith on or about the 31st day of December, 1896, or thereafter in good faith perfected.

17. The decision of the Court that the said attempted location made by Miller and his associates on the 31st day of December, 1896, was not a fraud upon the United States or evading the laws of the United States requiring one hundred dollars' worth of work to be performed annually upon each and every mining location.

18. The decision of the Court in permitting the said Miller and his associates to make or attempt a location on the 31st day of December, 1896, it appearing that the attempted abandonment by the said Miller of the Barieau location of June, 1895, was not concurred in by said Barieau and that said attempted abandonment by Miller was made for the purpose of

re-locating the same ground in order to evade the Statutes of the United States requiring one hundred dollars' worth of work to be done annually on each and every mining location.

19. The Court erred in holding that crude petroleum seeping from the ground was not a discovery, and that a seepage was a mere indication of oil.

20. The Court erred in holding that the seepage within the twenty acre tracts located by Chrismans and oil exposed in a spring thereon was not a discovery of mineral within the Statute.

21. The Court erred in holding that one person could locate a placer claim by one location to twenty acres of ground.

22. The Court erred in holding that any person in one location of placer mining ground could be vested with any rights from seven associates who had attempted to convey alleged rights to him, and thereby give one person the right to own or control by one location as much as one hundred and sixty acres of mineral land.

The error so specified is argued at length in the annexed brief.

IN THE

Supreme Court of the United States

A. Y. CHRISMAN AND H. T. CHRISMAN,
Plaintiffs in Error,
vs.
E. O. MILLER AND THE HOME OIL COMPANY,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

This is an action brought by defendants in error in the Superior Court of Fresno County, State of California, to quiet title to certain lands in said County of Fresno.

The complaint was filed on the 14th day of October, 1898.

The plaintiffs in error appeared and filed a joint answer in said action, A. Y. Chrisman claiming a certain part of said land and H. T. Chrisman claiming a certain other part thereof.

All of the parties claimed the land under and by virtue of locations alleged by them to have been made thereon under the laws of the United States regulating the sale and disposition of the mineral lands of the United States. A jury trial was waived, and after a hearing upon the merits a judgment was entered in said Superior Court in favor of defendants in error.

Appeals were taken by plaintiffs in error on the 16th day of December, 1899, from the judgment and also from the order of the Court denying their motions for a new trial, and on the 30th day of September, 1903, the Supreme Court of the State of California affirmed the judgment of the Superior Court.

Plaintiffs in error filed a petition for rehearing in banc which was denied, Chief Justice Beatty dissenting in a written opinion filed October 31, 1903.

The majority opinion of the Supreme Court of the State of California will be found on page 121 of the Record and Chief Justice Beatty's dissenting opinion appears on page 127 thereof.

Plaintiffs in error sued out a writ of error and the same was allowed November 7, 1903.

A.

STATEMENT OF THE CASE.

During the year 1895, and for a long time prior thereto, the land in controversy was a part of the

public domain of the United States open to exploration and location under the mining laws thereof. In the year 1895 certain persons, namely, Frank Barrett, K. W. Brown, James L. McLean, James E. Campbell, James A. McClurg, Sr., Hart H. Barrett, A. Barieau and J. J. Bright, as an association of persons, made a placer location upon the land specifically described as follows: The northeast quarter of section 20, township 19 south, range 15 east, M. D. B. and M., situate in Fresno County, State of California. This location was called the King Petroleum Placer Mining Claim and was made on the 14th day of June, 1895. For convenience this location will be referred to throughout this brief as the Barieau location.

Record, page 65.

Nothing further was done upon the ground by any one until the month of January, 1896, when the said A. Barieau went upon the land with a surveyor and distinctly marked the boundaries of said location upon the ground.

Record, page 65.

On or about the 24th day of December, 1896, seven out of the eight of the original locators of the King Petroleum Mining Claim made and delivered to the Producers and Consumers' Oil Company, a corpora-

tion, deeds of conveyance of their seven-eighths interest in said land. A. Barieau did not join in the conveyance, but as late as December 30th, 1896, was on the said land for the purpose of locating the quarter section.

Record, page 68.

On or about the 24th day of December, 1896, the Producers and Consumers' Oil Company conveyed the interests of Barieau's seven associates, which it had acquired as heretofore stated, to E. O. Miller, one of the defendants in error herein.

Record, page 43.

The said E. O. Miller afterwards, on or about the 29th day of December, 1896, made and executed an instrument in writing purporting to be an abandonment and relinquishment of his right, title and interest in the land in controversy to the United States.

Record, page 44.

This notice of abandonment was recorded in the records of Fresno County December 31, 1896.

Record, page 44.

On the same day, viz., December 31, 1896, said E. O. Miller attempted to make a location upon the land in controversy under the mineral laws of the

United States by posting a notice of location upon the ground. The names of the locators specified in the said notice of location were E. O. Miller, W. F. Hall, D. G. Overall, Harry Levinson, Charles H. Smith, J. A. Hannah, L. E. Hall and R. B. Biddle.

Record, pages 40, 41.

On the first day of January, 1897, A. Y. Chrisman, plaintiff in error herein, entered upon the land and made a placer location upon that portion thereof described as follows, to-wit, the south half of the southwest quarter of the northeast quarter of said section 20 above-mentioned, under and in pursuance of the laws of the United States and of the State of California, regulating the sale and disposition of mineral land of the United States in the State of California.

Record, page 80.

And on said first day of January, H. T. Chrisman, plaintiff in error herein, also entered upon the land in question, and in the same manner as aforesaid, made a location upon the south half of the southeast quarter of the northeast quarter of said section 20.

Record, pages 70, 71, 72.

Upon the 31st day of July, 1897, and before any discovery of oil had been made under Miller's alleged location, Miller's associates executed to him a

deed of all their right, title and interest in the property.

Record, pages 46, 47.

Subsequently and upon the 17th day of September, 1897, Miller executed a lease of the premises, which lease was transferred to the Home Oil Company, defendant in error herein.

Record, page 42.

The Home Oil Company thereupon took possession of the premises, bored for, and struck oil.

B.

CONTENTIONS OF PLAINTIFFS IN ERROR.

Plaintiffs in error contend:

I.

That the location by Barieau and others upon the 14th of June, 1895, was a valid location, which divested the land of its status as part of the public domain and appropriated it to private claim and domain until the end of the year 1896.

II.

That the alleged abandonment by E. O. Miller on December 31st, 1896, was invalid, inoperative

and of no effect because it was made with an intent and for the purpose of re-locating the property by himself and others working with him and was not a true abandonment.

III.

That the location made by E. O. Miller and others, on December 31st, 1896, was invalid, (a) because it was made at a time when there was a valid subsisting location on the land and at a time when the land was not open to exploration and location, and in consequence no rights whatever were initiated by that location; (b), because it was not based on a discovery and was not perfected by a subsequent discovery made before the rights of others attached to the property; (c), because the location in fact was made by Miller, Hall and Hannah, who were the only bona fide locators out of the eight persons named in their location, the other five being mere dummies.

IV.

That by reason of the fact that no assessment work whatever was done on the land in question in the year 1896, the location made by Barieau and others lapsed, and the land on the 1st day of January, 1897, became again open for exploration and location, and was open for exploration and location at the time plaintiffs in error made their locations thereon upon said 1st day of January, 1897.

V.

That the locations made by the plaintiffs in error were valid locations and were followed up by the doing of all those things required by law in order to make a valid mining location in the State of California.

VI.

That the conveyance to Miller upon the 31st day of July, 1897, by his seven associates, being given prior to a discovery of oil vested no title in him or his lessees and rendered the location invalid at least as to seven-eighths of the land in controversy. In other words, there can be no assignment of the right to locate.

C.

BRIEF OF THE ARGUMENT.

I.

The location made by A. Barieau and others on June 14, 1895, was a valid location, which operated to segregate the land from the public domain of the United States, and by itself, without any other act being done, prevented a location being made on the land in question prior to the first day of January, 1897.

All the parties hereto derive their claim of right to the land in question, under and by virtue of the

laws of the United States relating to placer claims, and hence the fundamental law applicable to the case will be found in sections 2320, 2324 and 2329, United States Revised Statutes, and an Act of Congress approved February 11th, 1897 (29th U. S. Statutes at large, 526) and the statutes of the State of California.

The sections, which are pertinent to the case at bar, are:

Section 2320:

> "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim."

Section 2324:

> "The location must be distinctly marked on the ground so that its boundaries can be readily traced."

Section 2329:

> "Claims usually called 'placers' * * * shall be subject to entry and patent under like circumstances and conditions and upon similar proceedings, as are provided for vein or lode claims."

Section 2330:

> "But no location of a placer claim made after the ninth day of July, eighteen hundred and sev-

enty-two, shall exceed one hundred and sixty acres for any one person or association of persons."

Section 2331:

"And no such location" (referring to a placer location) "shall include more than twenty acres for each individual claimant."

Under Act Cong., Feb. 11, 1897, C. 216, 29 Stat., 526 (U. S. Comp. St., 1901, p. 1434) the location of oil claims is governed by the mineral laws of the United States applicable to the location of placer mining claims.

By Section 2324, U. S. Comp., Statutes 1901, it is provided that on each claim located after the tenth day of May, 1872, not less than one hundred dollars of labor shall be performed or improvements made during each year. The period within which the work is required to be done is declared *"shall com-" "mence on the first day of January succeeding the " "date of location of such claim, and this section shall " "apply to all claims located since the tenth day of " "May, Anno Domini eighteen hundred and seventy-" "two."*

According to the record in this case, the first that is heard or known of the land in question was in 1889, when the witness Lavelle became acquainted with it. It was then unoccupied.

Record, page 84.

Barieau went on a prospecting trip in April, 1895, and found it unoccupied and unappropriated.

Record, page 65.

He made a discovery of petroleum oil on the land June 15, 1895.

Record, page 65.

Upon cross-examination, Barieau testified as follows respecting his discovery:

> "I saw some indications of oil on this northeast quarter in 1895, in June, and frequently since; all through the month of May up to June, I did nothing else but prospect around; I was there off and on quite often, crossed in every way. . . . The place where I saw the indications of oil is about 10 chains north from the southeast corner, and about 5 or 10 feet inside the section line; it comes out with the water, floats on the water. There is a permanent spring there, especially in the summer when it is hot. The oil runs there in the summer. I know the location because I surveyed it—run the line. There is a spring there and the oil comes out and floats on the water in the summer time when it is hot. In June, 1895, there was a little water with oil and a little oil with the water coming out. It was dripping over a rock about two feet high. There was no pool, it was dripping, just dripping a little water and oil, not much water. It was a narrow gulch. It didn't run down any distance from the point

where it dripped in, only maybe two or three feet."

Record, page 68.

On June 14th, 1895, Barieau posted a notice of location on the land for himself and seven others as an association.

Record, page 65.

In the early part of the month of January, 1896, Barieau again went upon the land, and more distinctly marked the boundaries of said claim. The boundaries were marked by placing stone monuments inscribed with the initials "J. H. F." as a monogram every ten chains on the exterior boundary lines of the claim, and at the corners he placed stakes in monuments of stone.

Record, pages 65, 66.

No intervening rights accrued between the date of the posting of the notice of location, June 14th, 1895, and the time of the marking of the boundaries as aforesaid in the early part of January, 1896.

In the meantime, a copy of the notice of location by Barieau and his co-locators had been recorded.

Record, page 65.

Thus it appears from the undisputed testimony of unimpeached witnesses that the locators of the

"King Petroleum Mining Claim" performed all the essential acts necessary to initiate a valid location, viz., (1) making discovery, (2) marking the claim on the ground, (3) posting the notice of location, and (4) recording the same.

(1) The discovery: In the consideration of the case at bar, it is necessary to bear in mind that the question here arises between parties claiming the land as mineral, and not between parties claiming the land under the laws relating to mineral lands on the one side and parties claiming the land under the laws relating to agricultural lands on the other. And, therefore, the *value or amount* of the mineral discovered cannot be made a question in this case.

The *value* of a mineral deposit is a matter into which the government does not inquire as between two mineral claimants. "Inquiries of this character "are confined to controversies between mineral and "agricultural claimants."

> *Lindley on Mines*, Vol. 1 (2nd ed.), p. 609.
> *Tam* vs. *Story*, 21 L. D., 440.

In a case of contest between mineral claimants on one side and parties holding town-site patents on the other, this Court has repeatedly declared, under the Act of Congress which governs such cases, in order to except mines or mineral lands from the operation of a town-site patent, it is not sufficient that the lands

do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect, but they must at that time contain mineral of such extent and value as to justify expenditures for the purpose of extracting them.

Deffeback vs. *Hawke,* 115 U. S., 392.
Davis vs. *Weibbold,* 139 U. S., 507.
Dower vs. *Richards,* 151 U. S., 658.
Migeon vs. *Montana Ry. Co.,* 77 Fed., 249.

Between two placer claimants the rule is different.

> "To hold that, in order to constitute a discovery as the basis of the location, it must be demonstrated that the discovered deposit will, when worked, yield a profit, or that the lands containing it are, in the condition in which they are discovered, more valuable for mining than for any other purpose, would be to defeat the object and policy of the law." Lindley on Mines, Vol. 1 (2nd ed.), p. 606.

Hence the precise question that is presented to this Court is What constitutes a discovery of petroleum oil under the statute in a controversy between two placer claimants?

The meaning of the word "discovery" does not differ essentially, as it is used in mining, from its meaning as employed in general literature. It is thus defined by the Century Dictionary: "The act "of disclosing to view; the act of finding out or

"bringing to knowledge what was unknown; the first "knowledge of anything."

Century Dictionary, tit. "Discovery," 1-4.

In his second edition of Mineral Lands, Mr. Copp has appended a glossary in which he thus defines "discovery": "The finding of mineral deposit in place upon a mining claim."

Copp's Mineral Lands (2nd ed.), p. 559.

There have been many acts of discovery and surface developments, which have been held to be sufficient under the statute, but it is believed that the case at bar is the first to come before this Court requiring a judicial determination as to what constitutes a discovery of oil under Revised Statutes 2320, 2324 and 2327.

In the case of *Book* vs. *Mining Co.*, 58 Fed., 106, there is found a discussion of what constitutes a "discovery" within the meaning of the United States statutes. And it has frequently been said by Courts that more than ordinary respect is due to the opinion in that case, because it is rendered by Judge Hawley, who enjoys, in a peculiarly high degree, the respect of the Courts and bar alike for his great learning upon the law of mining rights. At page 120, Judge Hawley said:

"What constitutes a discovery of a vein or lode within the meaning of the statute? Section 2320, Rev. St., provides that 'mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their location. A mining claim located after the tenth day of May, 1872, whether located by one or more persons, may equal, but shall not exceed, 1500 feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.' The words 'vein or lode,' in the last clause of this statute, were evidently intended to apply to such veins or lodes as were described in the first section, and to have the same meaning, viz., a vein or lode 'of quartz or other rock in place bearing gold, silver,' etc. This statute was intended to be liberal and broad enough to apply to any kind of a lode or vein of quartz or other rock bearing mineral, in whatever kind, character, or formation the mineral might be found. It should be so construed as to protect locators of mining claims, who have discovered rock in place bearing any of the precious metals named therein, sufficient to justify the locators in expending their time and money in prospecting and developing the ground located. It must be borne in mind that the veins and lodes are not always of the same character. In some mining districts, the veins, lodes, and ore deposits are so well and clearly defined as to avoid any questions being raised. In other localities, the mineral is found in seams, narrow crevices, cracks, or fissures in the earth, the precise extent and character

of which cannot fully be ascertained until expensive explorations are made, and the continuity of the ore and existence of the rock in place bearing mineral is established. It never was intended that the locator of a mining claim must determine all these facts before he would be entitled, under the law, to make a valid location. Every vein or lode is liable to have barren spots and narrow places, as well as rich chimneys and pay chutes, or large deposits of valuable ore. When the locator finds rock in place containing mineral, he has made a 'discovery,' within the meaning of the statute, whether the earth or rock is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim."

Commenting upon and approving Judge Hawley's decision in *Book* vs. *Mining Co.*, Mr. Justice Hunt, speaking for the Supreme Court of Montana, in *McShane* vs. *Kenkle,* 44 Pac., 979, at page 981, said:

"It will be observed that throughout the language of Judge Hawley, he does not establish any standard of judgment by which to warrant a justification except the existence, and expected existence, of geological or mineralogical facts from which certain reasonable conclusions are authorized to be drawn. The probable conduct of the practical miner or his beliefs are not regarded as rules or tests of the justification for the guidance of locators. Indeed, throughout his whole succinct and carefully considered statement of the law, as

quoted, the learned judge does not use the word 'miner' at all, but lays stress upon the liberality of the statute, which protects the locator in his discovery and location if rock in place is found containing precious metals, sufficient to justify such locator in prospecting and developing the ground located. Nor must the discoverer expect to find paying mineral in that particular crevice or vein or seam in which he finds his rock in place bearing metal, before he can make a valid location. This is plainly a study of Judge Hawley's opinion, by the law generally, and by the light of common knowledge. If a prospector in a mining region discover a seam with a well-defined wall, bearing indications of mineral sufficient to justify him in spending his time and money in following it, in expectation of finding a main body of ore of commercial value within the ground located, a valid location of a mining claim may be made, and the expectation need not be confined to finding paying mineral in the particular seam upon which the discovery is made."

Judge Beatty, of Idaho, in *Railway Co.* vs. *Migeon,* 68 Fed., 811, after quoting from *Book* vs. *Mining Co., supra,* said that the late decisions establish " the liberal rule that it is not necessary, to the loca- " tion of a valid claim, under section 2320, that ore " of commercial value in either quantity or quality " must first be discovered within its limits" (p. 814). And the United States Circuit Court of Appeals for the Ninth Circuit, in affirming the decision in *Railway Co.* vs. *Migeon, supra* (77 Fed., 249), at page 255 said:

"The question as to what constitutes a discovery of a vein or lode under the provisions of section 2320 of the Revised Statutes has been decided by many courts. All the authorities cited by appellants are referred to in *Book* vs. *Mining Co.*, 58 Fed., 106, 121. *The liberal rules therein announced are substantially to the effect that when a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery within the meaning of the statute whether the rock or earth is rich or poor, whether it assays high or low,* with this qualification: that the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found. *It was never intended that in such a case the courts should weigh scales to determine the value of the mineral found as between a prior and subsequent locator of a mining claim on the same lode.*"

The opinion of Mr. Justice Field in *Erhardt* vs. *Boaro*, 113 U. S., 527, contains a terse and very admirable summary of the statutory requirements of "discovery." At page 536, he said:

"This allowance of time for the development of the character of the lode or vein does not, as intimated by counsel, give encouragement to mere speculative locations, that is, to locations made without any discovery or knowledge of the existence of metal in the ground claimed, with the view to obtain the benefit of a possible discovery of metal by others within that time. A mere post-

ing of a notice on a ridge of rocks cropping out of the earth, or on other ground, that the poster has located thereon a mining claim, without any discovery or knowledge on his part of the existence of metal there, or in its immediate vicinity, would be justly treated as a mere speculative proceeding, and would not in itself initiate any right.

"There must be something beyond a mere guess on the part of the miner to authorize him to make a location, which will exclude others from the ground, such as the discovery of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence."
(Italics are ours.)

We think by applying the test laid down by the authorities to the case at bar, that Barieau made a discovery of oil on the land in question that in every way satisfied the statute. Although, at the risk of wearying the Court by what may seem needless repetition, attention is again called to Barieau's uncontradicted testimony. (Record, page 68):

"There is a permanent spring there, especially in the summer when it is hot. The oil runs there in the summer. I know the location because I surveyed it. . . . There is a spring there and the oil comes out and floats on the water in the summer time when it is hot. In June, 1895, there was a little water with oil and a little oil with the water coming out. It was dripping over a rock about two feet high. There was no pool, it was dripping, just dripping a little water and oil, not much water."

We respectfully submit that when Barieau had seen these oil seepages he made a discovery of oil within the meaning of the statute.

Speaking of what constitutes a discovery of oil under the Revised Statutes, Mr. Donahue, in his work on Petroleum and Gas, at page 233, says:

> "So where an oil claim is located on public lands, the locator must have actually ascertained that oil existed on the lands; and the fact that the surface indications were such, that oil might exist, is not sufficient; but the locator must know that oil existed; and a mere conclusion that oil does exist, which is drawn from other facts, is not a sufficient discovery, since the mere fact that lode or veins exist in adjacent lands is not a sufficient discovery. So, with the location of an oil claim, the fact that oil is found in nearby territory is not sufficient."

[1902] Donahue, Petroleum and Oil, p. 233.

We desire to call the Court's attention to the recent case of *Nevada Sierra Oil Company* vs. *Home Oil Company*, 98 Fed., 673, because we believe that it supports our contention that seepages of oil, when discovered upon government land, constitute a discovery of oil.

In that case, on demurrer to the bill, stated at length in 97 Fed. Rep., 681, 683, Judge Ross overruled the demurrer to the bill, which had been filed for want of equity, and sustained the bill as alleging a sufficient discovery, which, in the language of the

bill (97 Fed., 683), consisted of "the finding of seep-
" ages of oil and of the residuum of oil upon the
" claim and upon the land *adjoining* the said describ-
" ed tract."

Upon motion for injunction and receiver, in the same case (98 Fed., 675, 676) Judge Ross said:

> "The bill alleges that at the time of the posting of the notice of location of January 1, 1896, Wilson discovered seepages of oil on the land in question, as well as oil sand and shale, *but there is no showing in the proof that he discovered any seepages of oil on it.* On the contrary, I think the evidence shows beyond any doubt that there never were any seepages of oil on that quarter section of land.
>
> "It is entirely true that the statute, requiring as a condition to a valid location, the discovery of mineral within the limits of the claim, should, as between conflicting claimants to mineral lands, receive a broad and liberal construction, and so as to protect *bona fide* locators, who have really made a discovery of mineral, whether it be under the statute providing for the location of vein or lode claims or placer claims. As was well said by Judge Hawley, in *Book* vs. *Mining Co.* (C. C.), 58 Fed., 106, 120, in speaking of vein and lode claims:
>
> " 'When the locator finds rock in place containtaining mineral, he has made a discovery within the meaning of the statute, whether the rock or earth is poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes

the discovery, and warrants the prospector in making a location of a mining claim.'

"So, in respect to placer claims, if a competent locator actually finds upon unappropriated public land petroleum or other mineral in or upon the ground, and so situated as to constitute a part of it, it is a sufficient discovery, within the meaning of the statute, to justify a location under the law, without waiting to ascertain by exploration whether the ground contains the mineral in sufficient quantities to pay. The question whether a particular piece of the public land is more valuable for mineral than for agricultural purposes is one that does not arise in cases like the present. While, as has been said, the statute requiring a discovery of mineral as one of the essential conditions of a valid location of land under the mining laws should be liberally construed in behalf of *bona fide* locators, no court would be justified in ignoring the statutory requirement. Mere indications of mineral, I repeat, do not constitute the discovery of the mineral itself."
(The italics are ours.)

The decisions of Judge Ross, in the Home Oil case, upon demurrer to the bill, as well as upon the motion for injunction and receiver, show that his views are in harmony with both previous and subsequent decisions of the Federal Courts, and sustain the principle that in cases where both parties claim the land under mineral locations, that slight evidence only of a discovery of mineral, is required, which, in the case of petroleum, is sufficient where seepages

of oil or residuum of petroleum have been actually found upon the land located.

There is, of course, as Judge Ross says, a difference between "indications" of mineral and discovery of mineral itself.

In his work on Mines (2nd ed.), Vol. 1, p. 779, Mr. Lindley writes as follows respecting petroleum:

> "In the case of petroleum deposits the courts in California have in recent years been confronted with some serious problems upon the subject of what constitutes a sufficient discovery, which will sanction a location of a claim to oil lands under the laws applicable to placers. It is well known that the natural habitat of this class of mineral hydrocarbons is in stratified rocks some distance below the surface, *and except for the occasional appearance at the surface in the form of oil seepages, springs, or other indications of the subterranean existence of petroleum, there is nothing to guide the miner in making his location. It requires more or less extensive development in the nature of well-boring and prospecting to determine the nature, extent and permanency of the deposit.*
>
> "With reference to these surface indications, Judge Ross, Circuit Judge for the Southern District of California, expressed the view that:
>
> " 'Mere indications, however strong, are not, in my opinion, sufficient to answer the requirements of the statute, which requires, as one of the essential conditions to the making of a valid location of unappropriated public land of the United

States under the mining laws, of mineral within the limits of the claim. . . . Indications of the existence of a thing is not the thing itself.'

"This was said, however, not of indications existing within the boundaries of the claim in controversy but in adjoining lands.

" 'So, in respect to placer claims,' Judge Ross says, 'if a competent locator actually finds upon unappropriated public land petroleum or other mineral in or upon the ground, and so situated as to constitute a part of it, it is a sufficient discovery within the meaning of the statute, to justify a location under the law, without waiting to ascertain by exploration whether the ground contains the mineral in sufficient quantities to pay.'

"This is in consonance with the rules announced by the courts in the case of lodes, that neither the size nor richness of the vein is material, so long as there is a genuine discovery."

And at page 606 (Vol. 1), the same writer says:

"No Court has ever held that in order to entitle one to locate a mining claim ore of commercial value, in either quantity or quality, must first be discovered. Such a theory would make most mining locations impossible. 'Logically carried out,' says Judge Hawley, 'it would prohibit a miner from making any valid location until he had fully demonstrated that the vein, or lode, of other rock in place bearing gold or silver, which he had discovered, would pay all the expenses of removing, extracting, crushing and reducing the ore, and leave a profit to the owner. If this view should be sustained, it would lead to absurd, injurious and unjust results.' "

The language of Mr. Lindley and Judge Hawley, above quoted, namely, "that any other test or rule "would make most mining locations impossible," is peculiarly applicable to the land in controversy, for the evidence in this case shows (and, indeed, it is common knowledge) that to discover oil in paying quantites thereon, it is necessary to bore hundreds of feet.

In discussing the Barieau location, the Supreme Court of the State of California say:

> "It will be thus noted that none of the appellants claim under the Barieau location, nor contend that they have acquired any of the rights of those locators. It is agreed that if the Barieau location was in all other respects a valid location, it lapsed at the end of the year 1896 by failure to perform the statutory amount of labor. If, however, the Barieau location was an invalid location, as the Court finds, then the lands were open to notorious, peaceable, and *bona fide* entry by others for the purpose of initiating a new location. The findings of the Court, as has been said, were against the validity of the Barieau location. We are satisfied that it was invalid for at least one reason. Barieau and his co-locators did not at the time of their attempted location, nor ever, make any discovery of mineral upon the land. In considering this proposition, it should be said that the mineral upon these lands is oil. Under the Act of Congress of 1897, the location of oil claims is governed by the mineral laws of the United States applicable to the location of placer mining claims. The two requirements admittedly essential to the

validity of a location such as this, are that the location must be distinctly marked upon the ground so that the boundaries can be readily traced, and that there must be a discovery of minerals within the limits of the land located. (Rev. Stat. U. S., sec. 2324.) Upon the question of discovery the sole evidence is that of Barieau himself. Giving fullest weight to that testimony it amounts to no more than this, that Barrieau had walked over the land at the time he posted his notice and had discovered 'indications' of petroleum. Specifically, he says that he saw a spring and 'the oil comes out and floats over the water in the summer time when it is hot. In June, 1895, there was a little water with oil and a little oil with the water coming out. It was dripping over a rock about two feet high. There was no pool; it was just dripping a little water and oil, not much water.' This is all of the 'discovery' which it is even pretended was made under the Barieau location, and we think it clear that such testimony does not establish a discovery within the meaning of the law. To constitute a discovery, the law requires something more than conjecture, hope, or even indications. The geological formation of the country may be such as scientific research and practical experience have shown to be likely to yield oil in paying quantities. Taken with this there may be other surface indications such as seepage of oil. All these things combined may be sufficient to justify the expectation and hope that, upon driving a well to sufficient depth, oil may be discovered, but one and all they do not in and of themselves amount to a discovery. This view finds support in the *Nevada Sierra Oil Co.* vs. *Home Oil Co.*, 98 Fed. Rep., 673, where the Cir-

cuit Court was dealing with this precise question, in regard to this precise piece of land, under these identical circumstances. While perhaps it would be stating it too broadly to say that no case can be imagined where a surface discovery may be made of oil sufficient to fill the requirements of the statute, yet it is certainly true that no such case has ever been presented to our attention, and that in the nature of things such a case will seldom, if ever, occur. Nor does the view which we entertain of the essentials of a valid discovery as applied to oil bearing lands present any points of hardship, but to the contrary we think it to be not alone the only rational one which may be taken under the law, but also the only interpretation which offers security and protection to the *bona fide* locator."

Record, pages 122, 123.

We submit that the conclusion respecting the Barieau location, arrived at by the Supreme Court of the State of California, is a result of a misconception of the law and violative of the spirit and reason of the statutes governing the location of mining claims.

We respectfully submit that Congress did not intend that a prospector of oil, in order to make a valid location upon public land, has to bore and strike oil before making a valid location. According to the decision of the State Court, no matter if a stream of oil an inch thick was flowing from the land, it would not be sufficient upon which to base a discovery.

We contend that if a miner cannot make a valid location except by boring for oil that the public oil lands of this county are practically only open to location by rich and powerful corporations and individuals, and we cannot believe that such was the intention of Congress. It seems proper, in view of the importance of this question, to place before the Court a few facts bearing upon the early discoveries of oil and its remarkable history in this country.

Petroleum has been known from the earliest historic periods. Early notices of it are found in the Second Book of the Maccabees, Chap. I, "that when "the Jews were led into Persia, they found pits in "which the priests concealed the sacred fire they re-"quired for their sacrifices." After many years, their grandchildren—contemporaries of the Prophet Nehemiah—searched for the concealed fire and found an oil, which when poured upon the hot sacrificial stone, burst into a huge flame.

In Job, XXIX, 6, it is said: *"And the rock poured me out rivers of oil."*

Höfer states that Herodotus (about 450 B. C.) mentions that "eight days' journey from Babylon "stands a city called Is, the present Hit, on a small "river of the same name, which discharges its stream "into the Euphrates. Now the river brings down "with its waters many lumps of bitumen, which is

" collected and used in Babylon for building pur-
" poses."

H. Höfer, Das Erdöl, 1888.

George Henry Loskiel, in his "History of the " United Brethren Among the Indians in North " America," 1788, translated by Christian Ignatius La Trobe, London, 1794, speaks of petroleum as follows:

> "One of the most favorite medicines used by the Indians is the *fossil oil* (petroleum) *exuding from the earth commonly with water.* It is said that an Indian in the small-pox lay down in a morass to cool himself, and soon recovered. This led to a discovery of an oil spring in a morass, and since that time many others have been found in the country of the Delaware and Iroquois. They are observed both in running and standing water. In the latter, the oil swims on the surface and is easily skimmed off. But in rivers, it is carried away by the stream."

In the United States, the commencement of the industry dates from the period between 1850 and 1859. From 1859, the national wealth of the United States was thereby increased more than fifteen hundred million dollars. (Brannt, "Petroleum," p. 8.)

In 1861, a man named Frink drilled the first large flowing well. It yielded 100,000 gallons a day, and shortly afterwards another one nearby of equal capa-

city was struck. Oil wells were soon discovered in West Virginia, Kentucky and Ohio.

In 1885, the entire yield of the United States amounted to 22,000,000 barrels of forty-two gallons each, valued at $20,000,000.

In 1893, the entire United States production was 48, 412,666 barrels; and it is common knowledge that this vast industry is now controlled by a few individuals composing the Standard Oil Company.

Oil has been found in paying quantities in Pennsylvania, West Virginia, Illinois, Indiana, Ohio, Kentucky, Texas, Arizona, New Mexico, Colorado and California.

Petroleum Industry, O'Neil, p. 5.

Professor Benjamin Silliman, the elder, contributed to the "American Journal of Science," in the year 1833, what is believed to be the first reliable scientific record of the discovery of petroleum in this country. He writes as follows:

> "A fountain of petroleum, called the oil spring. This is situated in the western part of the County of Alleghany, in the State of New York. . . . The oil spring or fountain rises in the midst of a marshy ground. It is a muddy, dirty pool of about eighteen feet in diameter and is nearly circular in form.
>
> "There is no outlet above ground, no stream flowing from it, and it is, of course, a stagnant water, with no other circulation than that which

springs from the changes of temperature and from the gas and petroleum *that are constantly rising on the surface of the pool.*

"They collect the petroleum by skimming it like cream from a milk-pan. For this purpose, they use a broad, flat board, made thin at one edge like a knife; it is moved flat upon, and just under the surface of, the water, and is soon covered by a coating of petroleum, which is so adhesive, that it does not fall off, but is removed by scraping the instrument upon the lip of a cup. . . . It is used by the people of the vicinity for sprains and rheumatism, and for sores upon their horses. *It is said to rise more abundantly in hot weather than in cold.*"

Mr. O'Neil, writing upon the development of the petroleum industry in California, says:

"In California it (petroleum) has long been known, having been used by the Indians and Mission Padres. . . . The immense deposits of asphaltum in the Southern part of the State, and gas wells *and oil seepages in other localities were almost certain indications that* large amounts of petroleum were buried beneath the surface."

Naturally, to bore or drill for oil necessitates a large expenditure of money. Before this can be done the prospector must locate a place that justifies him in spending money for such purposes, and in the oil regions of the West he depends upon what he sees before spending time and money experimenting. And it does not require a trained expert to appreciate

that when he sees oil coming up from the ground that he has made a discovery of that mineral.

Whether a prospector will select this place or that place may depend very largely upon the physical features of the country.

Mr. William Wright, in his book on "The Oil Regions of Pennsylvania," published in 1865, speaking of the physical features of oil regions, says:

> "The wells put down five or six years since, in several cases, got petroleum in the first sand-rock, their owners having been led to select such spots from 'surface indications'; *that is, petroleum oozing out of the ground.*"

In Thompson and Redwood's Handbook on Petroleum, published in London, 1901, it is said (p. 3):

> "Petroleum is found in many parts of the world oozing or flowing from outcrops of porous rock, *and from this mode of occurrence it derived its name,* which means, literally rock-oil—Latin, *petra* (rock), *oleum* (oil)."

In the Century Dictionary (Vol. 15), edited by Prof. Whitney of Yale University, petroleum is defined as "an oily substance of great economical im-
" importance, especially as a source of light, *occur-*
" *ring naturally oozing from crevices in rocks or*
" *floating on the surface of water,* and also obtained
" in very large quantity in various parts of the world
" by boring into the rock."

Referring to the State Court decision upon Barieau's discovery, it is said:

> "To constitute a discovery, the law requires something more than conjecture, expectation, hope, or even indications. The geological formation of the country may be such as scientific research and practical experience have shown to be likely to yield oil in paying quantities. Taken with this, there may be other surface indications, such as seepage of oil. All these things combined may be sufficient to justify the expectation and hope that, upon driving a well to sufficient depth, oil may be discovered, but, one in all, they do not, in and of themselves, amount to a discovery. This view finds support in the *Nevada Sierra Oil Co.* v. *Home Oil Co.*, 98 Fed. Rep, 673, where *the Circuit Court was dealing with this precise question, in regard to this precise piece of land, under these identical circumstances.*"

(Italics are ours.)

In the part of the opinion just referred to it will be seen that the Supreme Court of the State of California relies upon *Nevada Oil Co.* vs. *Home Oil Co.*, 98 Fed., 673, as supporting the statement that "sufficient "indications, such as seepage of oil," are not sufficient in themselves to constitute discovery, and the Court also observes that, in regard to this precise piece of land, under these identical circumstances, the Circuit Court so ruled. We submit that in this the State Court fell into a grievous and curious error. We have called attention to the Federal case (*Nevada Oil*

Co. vs. *Home Oil Co.*, 98 Fed., 673), and it is difficult to understand how the human mind could possibly distort that decision so as to conform to the language in the State Court opinion.

An examination of the decision of Judge Ross shows that he based his decision chiefly upon the fact that *no seepage had been shown upon the land,* and, in fact, in the trial of that case, the testimony was to the effect that, while there was no oil of any quantity actually discovered upon the land, that the formation of the adjoining land, seepages *upon adjoining property,* and other geological characteristics, indicated that oil would be found on the property in question. This was a mere conjecture, hope and expectation, not founded upon discovery of oil upon the land, and we fail to see how any of the language of Judge Ross can be authority in support of the State Court opinion. *Judge Ross expressly stated there was no showing in the proof that any one had discovered any seepages of oil upon the land in question,* while the State Court erroneously assumed that there were seepages upon it.

In the case at bar, the testimony is uncontradicted that oil was seen by Barieau seeping from the ground in controversy, and that oil was actually mingled with the earth. And we shall show, further on in this brief, that oil was actually taken from the ground by the Chrismans. That being so, there was something more than indications of oil *under the surface* of the

ground in question, which might or might not prove to be true.

Judge Ross says, "Indications of existence of a "thing is not the thing itself"; and he further says that *if the locator actually finds, upon public land, petroleum in or upon the ground, and so situate as to constitute a part of it, it is a sufficient discovery, within the meaning of the statute, to justify a location under the law, without waiting to ascertain by exploration whether the ground contains the mineral in sufficient quantities to pay.*

The locator who sees oil in place does not discover indications, but the thing itself. The amount discovered may be an indication of what may be expected to be realized by development, but cannot be said to be merely an indication.

We respectfully submit that it is not for any Court to say as to the manner of extraction or the practicability of the plant used. When the oil is shown mingled with the earth, we submit that, under the decisions, a discovery has been made—not indications, but the real thing itself.

Judge Hawley, in *Book* vs. *Mining Co., supra,* says, the discovery of rock in place, containing mineral, is a discovery, no matter whether the rock or earth is rich or poor, or whether it assays high or low, and that the finding of mineral in place, distinguished from float, warrants the discoverer in making a loca-

tion. Why not so with oil? A seepage from the rock or shale is, of course, in place. In order to be a seepage, it must be forced from the larger body of oil, must be a continuous stream, *en train,* and should stand upon the same footing as to discovery as a ledge. The State Court says: "There may be other sur- " rounding indications, such as a seepage of oil." Does the Court mean surrounding indications, upon adjoining land, or upon the land in question? Why should a discovery of oil upon, say, Section 20, be said to be only indications of oil upon that section? What is it but oil?

Columbus discovered America when he saw it. Would it be correct to say he discovered indications of land when he saw it?

It is a well known fact that oil is never discovered in paying quantities upon the surface, and that it requires much labor and expense to drill deep enough to secure it in such quantities.

According to the decision of the State Court, no matter if a stream of oil an inch thick was flowing from the land, it would not be sufficient upon which to base a discovery. No one could acquire any right whatever to justify him in spending money and endeavoring to get a well. Everybody would have an equal right to drill, and the right to the title to the land would be left to the strongest and most aggressive. The bullet

and knife would take the place of a location notice. Surely, the Government did not intend such to be the case when it said that oil land might be located as placer. How much mineral must be discovered in a placer claim? The authorities are uniform that any quantity of mineral, no matter how small, is sufficient as between mineral claimants. Then why not any quantity of oil?

Possibly, as suggested by the decision of the State Court:

> "The borer is the wooer of the earth; her secrets and riches are his."

But such wooing is an expensive luxury!

> "The cost of an American boring plant is not far from $3,220. By this is meant merely the initial charges."
>
> *Technology of Petroleum,* Neuburger and Noalhat (translated by J. G. McIntosh), 1901, p. 243.

It appears from the evidence of Mr. Canfield (Record, page 60) *that the Home Oil Company paid $8,000 to sink one well!*

Therefore, we conclude that when Barieau saw oil oozing from the ground in controversy, in 1895, he made a discovery, within the meaning of the statute.

(2) *Marking the Claim on the Ground.*

Section 2334 of the United States Revised Statutes

provides that the location must be distinctly marked on the ground, so that the boundaries thereof can be readily and easily traced. The testimony shows that this was done at the time of the posting of the notice by Barieau on the land in controversy, namely, June 14, 1895.

Record, page 65.

Even if there could be any question as to the sufficiency of the markings made by Barieau, at the time of making the location, June 14, 1895, all defects were remedied by his going upon the land in the first week in January, 1896, when he resurveyed and remarked the lines of the claim.

Record, page 65.

We, therefore, submit that the location made June 14, 1895, was properly marked upon the ground as contemplated by the Statute of the United States last above cited.

Vide McKinley Mining Co. vs. *Alaska Mining Co.,* 183 U. S., 563, 570.

Haws vs. *Victoria Copper Mining Co.,* 160 U. S., 303, 318.

Book vs. *Justice Mining Co.,* 58 Fed. Rep., 106, 109, 112.

(3) and (4). *Posting and Recording Notice of Location.*

We consider both these points together for the reason that one argument applies to both.

We call the Court's attention to the fact that there is no proof of any state or local regulation or local custom existing at the time of the location of the land, made June 14, 1895, requiring the doing of either of these things. As a matter of strict law there was no statutory requirement that the notice should be posted or recorded.

> *Book* vs. *Justice M. Co.*, 58 Fed. Rep., 120.
> *Haws* vs. *Victoria Copper Min. Co.*, 160 U. S., 303, 318.

But both of these things were done and shows the absolute good faith of the locators of said claim.

> *Record*, page 65.

Therefore, the location made June 14, 1895, having been preceded by a sufficient discovery, and having been properly marked on the ground, the notice of location having been properly posted and recorded, was a valid location in every respect, was in existence and in full force and effect during the entire year 1896, *and it is of no consequence* that no annual labor was performed during that year by any of the locators of said claim, for a valid location having

once been made the locators thereof have the whole of the calendar year in which to do or perform the annual labor. The Supreme Court of the United States, interpreting the statute with reference to annual labor, has said:

> "The law fixes no time within a year when the work must be done. Consequently, if done at any time during the year, it is enough, and there can be no forfeiture until the time has gone by."

Belk vs. *Meagher,* 104 U. S., 279, 283.

Even though no work is done in the calendar year following the date of the location of a mining claim, the locators, or their grantors, have the absolute right to the possession of the property as against all the world until the last hour of the last day of the year, "for the time within which the assessment work is "to be done, begins on January 1st and ends on De- "cember 31st." "Lands are not open to re-location "until the rights of the former locators have come "to an end."

Belk vs. *Meagher,* 104 U. S., 279, 284.
Rose vs. *Richmond Min. Co.,* 17 Nev., 57.
Book vs. *Justice Min. Co.,* 58 Fed., 128.
Souter vs. *Maguire,* 78 Cal., 545.

Hence we say that the location made by Barieau and others on June 14, 1895, operated to segregate the land from the public domain so far as subsequent

mining locations were concerned, and without any other act being done, prevented the making of the location of the land in question by any one prior to the 1st day of January, 1897.

II.

The alleged abandonment by E. O. Miller in December, 1896, was invalid, inoperative and of no effect because it was made with an intent and for the purpose of re-locating the property by himself and others with him, and was not a true abandonment.

We insist that there was no abandonment by Miller in any sense of the word, even if we grant, for the sake of argument, that he was the successor in interest of *all* of the locators who made location on June 14, 1895, for the reason that there was an entire absence of intent to vacate and leave the premises open to the first comer, but on the contrary the express intention of Miller was to secure the land for himself.

It is to be borne in mind that the Barieau location did not become forfeited for failure to do assessment work until after midnight, December 31st. It was not open to re-location therefore until January 1st, 1897. But Miller claiming to have succeeded to the rights of the original locators, attempted to abandon the location in the following manner. We quote from his testimony at page 45 of the Record:

"I abandoned to the United States whatever there might be. I wanted to make it clear so there would be no question. I wanted to go as far as I could, if they (referring to his grantors) did happen to have any possible right. I wanted to clean it up. I didn't think they had, but my purpose was, if any existed, to revest the title in the government of the United States, so that I could make—so the land would unquestionably be open to location December 31, 1896,—myself and my co-locators could make a valid mineral location. I wanted to play both ends of the proposition to be safe."

(For the instrument called an "abandonment" see page 44 of the Record.)

"This abandonment was prepared at Visalia on December 29, 1896. I sent it to Fresno to Judge Harris to have it recorded; I mailed it to him I think on the night of the 29th, just before I started to Coalinga, where I got the next day. The execution of this abandonment, and the sending of the abandonment to Judge Harris, was preparatory to my making the location of December 31st, *and it was a part of the same transaction.* The notice of re-location was prepared in my office at the same time as the abandonment."

Record, page 50.

We quote again on this subject from the testimony of the witness W. F. Hall, one of Miller's associate locators (Record, page 57):

"I think it is a fact that on the 29th day of De-

cember, 1896, the day before we went to Oil City, that Mr. Miller agreed that he would make an abandonment of any interest that he might have in this land that came to him through this Producers and Consumers' deed. I think I saw the instrument in writing releasing and abandoning all interest that he had in this land to the United States, and I am sure I knew of it.

"The Court—Q. Did you understand at that time that Mr. Miller had released his interest in that to the government, so that you and he could file your mineral claims on that quarter section?

"Mr. Harris—We admit that.

"Mr. Coldwell—of course."

Record, page 58.

Briefly, then, the facts are these: The location claimed to be owned by Miller is about to lapse by reason of failure to perform the assessment work. Instead of proceeding to perform such work, Miller endeavors to fabricate a pretended abandonment—a written relinquishment of his claim to the land—which is mailed from Visalia to Fresno at the same time that he starts for the land in controversy, and posts the notice of re-location which had been prepared contemporaneously with this alleged notice of abandonment. (The abandonment was recorded Dec. 31, 1896.)

Record, page 44.

Therefore the precise question that is presented to this Court is:

Can the locator of a placer claim, who has allowed his location to lapse by a failure to perform the necessary work, abandon his claim with the intention of immediately making a re-location covering the same ground?

When is a mining claim abandoned? Manifestly there is no abandonment when there is no intention of giving up and renouncing a thing.

In the case of *Black* vs. *Elkhorn Mining Co.*, 163 U. S., 445, the Supreme Court say at page 450:

> "His (a locator's) interest in the claim may also be forfeited by his abandonment, *with an intention to renounce his right of possession.* It cannot be doubted that an actual abandonment of possession by a locator of a mining claim, such as would work an abandonment of any other easement, would terminate all the right of possession which the locator then had."

Bouvier says: "An abandonment is the relinquish-
" ment of a right, the giving up of something to
" which we are entitled. Abandonment must be
" made by the owner, without being pressed by any
" duty, necessity, *or utility to himself, but simply be-*
" *cause he desires no longer to possess the thing.*"
This definition was approved in the following cases:

Stevens vs. *Mansfield,* 11 Cal., 363.
Richardson vs. *McNulty,* 24 Cal., 339.
St. John vs. *Kidd,* 26 Cal., 264.
Bell vs. *Bedrock, T. and M. Co.,* 36 Cal., 214.
McLeran vs. *Benton,* 43 Cal., 467.
Utt vs. *Frey,* 106 Cal., 392.
Trevaskis vs. *Pearl,* 111 Cal., 599.

In *St. John* vs. *Kidd, supra,* the Court laid down the rule that in all cases of abandonment the test is, *"was the land left by the locator without any intention of returning or making any future use of it?"*

In the recent case of *McCann* vs. *McMillan,* 129 Cal., 350; 62 Pac., 31, it appeared that McCann and McMillan tried to re-locate a mining claim by abandoning the same for the purpose of avoiding the assessment work. The Supreme Court of the State of California held that the abandonment was made with the intent to defraud the United States Government out of one hundred dollars' worth of work and that they could not re-locate in such a manner.

The Supreme Court of Arkansas in the case of *Buffalo Zinc & Copper Co.* vs. *Crump,* 69 S. W., 572, 576 (1902), at page 576, said:

> "An abandonment is a voluntary act, and consists of the relinquishment of possession of the claim, with an intention not to return and occupy it. It is purely a question of intention. 'If there is no *animus revertandi,* the desertion of the claim determines the property at once, without regard

to the duration of the locator's absence.' To constitute an abandonment there must be an absolute desertion of the premises." (Citing Lindley on Mines, Sec. 643.)

Briefly stated our contention is that a locator cannot abandon a claim with the intention of re-locating, and we submit that it is not necessary in determining this question to affirmatively show that such abandonment was necessarily made for the purpose of avoiding the assessment work. The question is, can it be done at all where there is the intent to re-locate at the time of abandonment?

If we are wrong then it is self-evident that Courts would be lending themselves to support schemes whereby the laws of the United States requiring *bona fide* work to the amount of $100 each year on all claims in order to hold them would be entirely unenforceable.

If the claimant could allow the year to expire all but a day, and then re-locate by abandoning, one locator could perpetually hold a claim without ever expending a cent of money or an hour's work in its development. *Indeed one man could locate an entire district and hold it perpetually without the expenditure of a cent in work or money.*

As stated by Mr. Lindley in his Work on Mines (vol. 1, p. 729), 2nd ed.:

"To say that the original locator has the power within himself to make effectual a forfeiture aris-

ing from his own delinquency by performing a re-location, is to place in his hands the extraordinary privilege of holding mineral lands perpetually, without doing any work whatever, at least in those states where the re-locator is not required to do preliminary work."

Therefore, we insist that manifestly there was no abandonment by Miller in any sense of the word, even if we grant for the sake of the argument that he was the successor in interest of *all* of the locators who made location on June 14, 1895, for the reason (a) there was an entire absence of intent to vacate and leave the premises open to the first comer, but on the contrary the express intention of Miller was to secure the land for himself; (b) Miller was "pressed by necessity and utility to himself," for the reason that no annual labor had been done upon the claim or land in controversy during the year 1896. Therefore the location of 1895 was not affected by this attempted abandonment, nor the life thereof, nor the rights or obligations of the locators, and their grantees were not affected in any manner thereby. The location made by Barieau in 1895 was just as valid and complete after the attempted abandonment as before. The purported abandonment was not effective for any purpose whatever, and was wholly inoperative.

III.

The location made by E. O. Miller et al., on December 31, 1896, was invalid (a) because it was

made at a time when there was a valid, subsisting location on the land, and at a time when the property was not open to exploration and location, and in consequence no rights whatever were initiated by that location; (b) because it was not based on a discovery, and was not perfected by a subsequent discovery made before the rights of others attached to the property; (c) because the location, in fact, was made by Miller, Hall and Hannah, who were the only bona fide locators out of the eight persons named in their location, the other five being mere dummies.

These points will be discussed in the order stated.

A. The location referred to was invalid because it was made at a time when there was a valid, subsisting location on the land, and at a time when the land was not open to exploration, and in consequence no rights whatever were initiated by that location.

We have shown that A. Barieau and other persons made a valid location upon the land in controversy on June 14, 1895. This location did not come to an end until the morning of January 1, 1897. Consequently we invoke the rule enunciated by this Court in the case of *Belk* vs. *Meagher*, 104 U. S., 279, where Mr. Chief Justice Waite, speaking for the Court at page 284, said:

> "Mining claims are not open to re-location until the rights of a former locator have come to an end. A re-locator seeks to avail himself of

> mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim and left the property open for another to take up. . . . Hence a re-location on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done."

The same rule was stated by the Supreme Court of the State of California in the case of *Souter* vs. *McGuire,* 78 Cal., 545. A location upon land upon which there already exists a valid location is invalid, no matter how perfect in form the proceedings upon which the second location may be based.

Vide Gwillim vs. *Donnellan,* 115 U. S., 45, 49.
Del Monte Min. Co. vs. *Last Chance Min. Co.,* 171 U. S., 55, 78.

We have shown that the Barieau location, made on June 14, 1895, did not terminate until "the last hour of the last day of the year" of the time within which the assessment work should be done, and that the time for doing the assessment work did not expire until December 31, 1896. The location attempted to be made by Miller and his associates on the land in question was made on the morning of the 31st day of December, 1896.

Record, page 40.

Clearly, therefore, the location made by Miller and others was premature, inoperative for any purpose, and void, and under it the defendants in error cannot successfully assert or claim any right to the land, for no rights were initiated and none were ever acquired by the location. Clearly the land was not open to exploration and location at any time of December 31, 1896. The purported abandonment of Miller, we have shown, was entirely inoperative and nugatory and did not change the status of the land in any respect. Hence we conclude that plaintiffs in error have a right to take advantage of the fact that a prior location existed at the time that Miller and others made their location to show that the land was not open to location at that time.

B. Location was invalid because it was not based on a discovery, and was not perfected by a subsequent discovery made before the rights of the plaintiffs in error attached to the property.

Neither Miller nor any of the other persons named in the location notice posted on the ground by Miller on December 31, 1896, made a discovery of any mineral upon the land in question. Miller, himself, said that he did not make any discovery prior to said date, and the only discovery that he ever made on the land was made through the operations of the Home Oil

Company, some time subsequent to September 17, 1897.

Record, pages 46, 42.

Plaintiffs in error made their locations Jan. 1, 1897 (pages 61, 62, of this brief).

Therefore, we respectfully submit that—whether or not the land was open to exploration and appropriation on the 31st of December, 1896,—Miller and his co-locators did not make a valid location upon the ground on said date, because of non-compliance with the provisions of the mining laws and failure to perform the acts necessary to the initiation of a valid location; and whatever preliminary acts may have been performed by them were, in the absence of a discovery on or before said date, insufficient to bar a complete and valid location made by plaintiffs in error upon the following day, based upon *discovery* and full requirements of the mining laws.

The mere marking of a location upon the ground and posting a notice thereon initiates no rights to the ground and bars no rights which another person, if a *bona fide* locator, may wish to assert. Miller's alleged location of December 31st, 1896, did not segregate the land from the public domain and did not prevent plaintiffs in error from going upon the ground on January 1st, 1897, and making a valid location thereon.

Discovery is the source of title to mineral lands and the primary source of the miner's title thereto.

U. S. Revised Statutes, Sections 2318, 2319, 2320.

Lindley on Mines and Mining, Vol. 1, Sec. 335 (2nd ed.)

As was said by Halleck in his introduction to De Fooz on the Law of Mines, p. xxvi, "*Discovery* is "made the source of title and *development* or work-"ing, the condition of the continuance of that act."

A location can rest only upon an actual discovery, and such discovery must precede the location or be in advance of intervening rights.

Hawswirth vs. *Butcher,* 4 Mont., 299.
Upton vs. *Larkin,* 7 Mont., 449.
North Noonday M. Co. vs. *Orient M. Co.,* 6 Saw., 299.
Ledoux vs. *Forester,* 94 Fed., 600.
Perigo vs. *Erwin,* 85 Fed., 904.
Erwin vs. *Perego,* 93 Fed., 608.
Nevada Sierra Oil Co. vs. *Home Oil Co.,* 98 Fed., 673.
Olive Land & D. Co. vs. *Olmstead,* 103 Fed., 568.

Mr. Justice Field, speaking for the Court in the

case of *Erhardt* vs. *Boaro,* 113 U. S., 527, at page 536, said:

> "The mere posting of a notice on a piece of land by one who has no knowledge on his part of the existence of mineral therein, and without a previous discovery, would be justly treated as a mere speculative proceeding and would not initiate any right. There must be something beyond a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground."

In view of the foregoing authorities, we maintain that the location of December 31, 1896, was invalid; that it was not cured by the discovery of the locator's lessee; and that the discovery and other acts of location made and performed by the plaintiffs in error on January 1st, 1897, entitle the latter to the land in controversy. The facts constituting the Chrismans' discoveries will be shown in discussing those points (pages 61, 62 of brief).

C. The location made by Miller et al. on December 31, 1896, was not valid, because the location in fact was made by Miller, Hall and Hannah, who were the only bona fide locators out of the eight persons named in their location, the other five being mere dummies.

On December 31, 1896, E. O. Miller posted a notice of location on the land in question, thereby at-

tempting to locate a full quarter section of 160 acres. In order to successfully make such a location under the mining laws of the United States, it was necessary that there should have been an association of not less than eight persons. (Revised Statutes of the United States, Section 2330.) The mining laws of the United States originally contemplated that each individual citizen should have the right to locate 20 acres of placer mining land. In order, however, that placer mining might be developed to its full extent, this right of individual location was extended so that eight persons, instead of making individual locations of 20 acres, might form an "association" and together locate 160 acres. In order that such a location may be legal, each of the requirements of the statute must be complied with, and the demands of the statute fulfilled. There must be eight persons, each qualified to make a valid location of 20 acres. The eight, before making the consolidated location, must form "an association." *All must be interested in the location, and the location must have been made by all, whether they all acted upon the ground or authorized some one of the number to act for all.* Otherwise they are not *bona fide* locators within the meaning of the statute—Congress has used the term "association." It is submitted that, in using such a term, Congress intended to signify a body of persons who had confederated together for a particular purpose,

or united together without a charter for the prosecution of some common enterprise. Does the evidence in this case disclose any such confederation or union of persons?

An examination of the testimony shows that Miller, Hannah and Hall entered into a contract, agreement, union or confederacy, as they may choose to term it, to locate this northeast corner of Section 20. It was necessary that they should have at least eight names on their location, and to that end, without making any explanations or disclosing who were to act with them, and without any prior contract or agreement whatever, they severally went to the five other persons named in the location and obtained from them permission to *use* their names. Even in this regard there was no union of action. Mr. Hall, acting by himself, secured the names of certain of the five, and Mr. Miller, acting by himself, without concert with his partners, secured the balance, neither consulting with the other and none of the five really understanding what was intended, and agreeing to nothing whatever, either with Mr. Hall, Mr. Hannah or Mr. Miller, or with their so-called associates, except merely granting the privilege of using their names in making the location.

E. O. Miller testified as follows:

"Prior to making this location I talked with Mr. Hannah and Mr. F. Hall, and *possibly* with

Mr. Overall. There was no arrangement between us three in regard to making these locations except that we would go over there and locate this ground for mining purposes. I don't know that there was any specific arrangement about going ahead to develop or to bore for oil, but it was understood that we were to take it for the purpose of mining, for the purpose of developing. There were no details entered into at that time. I never talked with Charles H. Smith, L. E. Hall or R. B. Biddle about the matter, nor had any arrangement with them; but, as I told you, *I might possibly have talked with Mr. Overall.*"

Record, page 46.

There was no contract between the eight parties, no confederacy, no union, no anything constituting the eight a partnership, or *quasi* partnership, or "association," within the meaning of the United States Statute. It has been uniformly held by federal courts that such attempted location is of no avail, and a fraud upon the government. In *Lindley on Mines* (Vol. 1, Sec. 450), 2nd ed., it is said:

"It is a matter of frequent occurrence that an individual locator, desiring to obtain more ground than he is permitted under the law to appropriate in his individual capacity by a single location, resorts to the use of "dummies" and perfects locations in their names, subsequently obtaining conveyances thereof. The courts have held that this is a fraud upon the government."

In *Durant* vs. *Corbin,* 94 Fed., 382, District Judge Hanford, at page 383, said:

> "The policy of the government in disposing of the mineral lands as well as other portions of the public domain is to make a general distribution among as large a number as possible of those who wish to acquire such land for their own use rather than to favor a few individuals who might wish to acquire princely fortunes by securing large tracts of such lands, and it is contrary to this policy and to the provisions of sections twenty-three hundred and thirty and twenty-three hundred and thirty-one of the Revised Statutes for one person to cover more than twenty acres of placer ground by one location by the device of using the names of his employees and friends as locators."

Vide Gird vs. *Californa Oil Co.,* 60 Fed., 531, 545.

Mitchell vs. *Cline,* 84 Cal., 409.

Before any discovery of oil had been made upon the Miller location, seven of the co-locators conveyed to Miller their interests.

Those whose names are used for the purpose of filling out the location are rightly termed "dummies" by the courts and the authorities. All the parties named in the location attempted to be made December 31, 1896, other than Miller, Hannah and Hall, were "dummies," as the term is used and understood, and the location for that reason was a fraud upon the United States Government, and void and of no effect.

IV.

By reason of the fact that no assessment work whatever was done on the land in question in the year 1896, the location made by Barieau and others lapsed, and the land on the 1st day of January, 1897, became open for exploration and location.

A. Barieau and others having, as we have shown, on the 14th day of June, 1895, made a valid location upon the land in question, it then became incumbent upon them, or their grantees, to do certain other acts, or else forfeit whatever rights they had acquired by such location. It was necessary for them to do a certain amount of work upon their claim during the year following its location, namely, the year 1896.

U. S. Revised Statutes, Sec. 2324.
Belk vs. *Meagher,* 104 U. S., 279.
Hammer vs. *Garfield M. Co.,* 130 U. S., 291.

According to Barieau, no work whatever was done on the land in 1896.

Record, page 66.

It follows from the foregoing, that the location made by Barieau and others, while reserving the land from appropriation by others up to January 1, 1897, on that date lapsed because the assessment work required by the statute to have been done in the year 1896 was not done, and, in consequence, whatever

claims Miller or others may have had to the land involved herein, and covered by said location, became valueless on the first day of January, 1897. There can be no question of "resumption" of work by the claimants under the Barieau location made in 1895, because the evidence conclusively shows that no work was done at any time either before or afterwards by these persons, or their grantees, and that whatever work was done there was done by the Home Oil Company during the year 1897, as tenants of E. O. Miller, under his claimed location made December 31, 1896. Therefore, the land in controversy, by reason of the lapsing of the location made in 1895, became open for exploration and location on January 1, 1897.

V.

The locations made by the plaintiffs in error, January 1, 1897, were valid locations. They performed every act required by law to make a valid location in the State of California.

Prior occupation and working of mineral lands of the United States, without conforming to the requirements of any law, either federal, district or local custom, does not give the right of possession as against one who afterwards peaceably locates a mining claim covering the same ground, and in all respects complies with the federal and district mining laws and customs.

From the time the second person has perfected his location, the prior occupant is a trespasser.

Belk vs. *Meagher,* 104 U. S., 279.
Horswell vs. *Ruiz,* 67 Cal., 111.
Morenhaut vs. *Wilson,* 52 Cal., 263.
McCormick vs. *Varnes,* 2 Utah, 355.
Noyes vs. *Black,* 4 Mont., 534.

Manifestly, then, if the evidence shows that the plaintiffs in error complied with the laws in making their locations on the portions of land claimed by them, they had a right to locate, and the possession or occupancy of Miller, actual or constructive, on January 1, 1897, was of no avail as against plaintiffs in error.

The evidence shows that A. Y. Chrisman and H. T. Chrisman did everything that was necessary to initiate a valid location on the first day of January, 1897.

A. Y. Chrisman made a discovery of petroleum within the boundaries of his claim prior to posting the notice.

Record, page 82.

This testimony is corroborated by H. T. Chrisman.

Record, page 75.

In December, 1896, he took some of the liquid to Lavelle to be tested.

Record, page 79.

A. Y. Chrisman marked the location upon the ground by means of sufficient monuments, and posted a notice of location thereon.

Record, pages 80, 81.

He has been in possession ever since. Affidavits of work have been filed of record.

Record, pages 82, 86.

H. T. Chrisman made discovery upon his own claim near the southeast corner of the northeast quarter.

Record, page 75.

He posted a notice of location and built monuments to mark the boundaries.

Record, pages 72, 73, 74.

He remained in exclusive possession up to the time this action was instituted.

Record, page 75.

Plaintiffs in error not only performed the neces-

sary annual labor prescribed by law, but also prosecuted extensive improvements.

Record, pages 85, 86, 87.

The foregoing testimony is undisputed. The law governing the question of discovery has already been discussed in this brief (pages 13 to 38 inclusive).

VI.

The conveyance to Miller by his associates upon July 31, 1897, being given prior to any discovery, vested no title in him or his lessees.

The admitted facts, for the purpose of considering this question, are, that E. O. Miller and W. F. Hall, on the 31st day of December, 1896, went upon the northeast quarter of section 20, township 19 south, range 15 east, M. D. M., and posted a notice of location for themselves and six others named in the notice, and marked the boundaries; that on July 31st, 1897, all of E. O. Miller's co-locators executed a deed to him, in and by which they conveyed, or transferred to him, all their right, title and interest in and to said property under said location.

Record, page 47.

On the 17th day of September, 1897, E. O. Miller executed a lease of said premises to Frank Barrett,

and at about the said time transferred said lease to the Home Oil Company.

Record, page 42.

The Home Oil Company went upon said premises and commenced boring for oil, and at some time subsequent to September 17th, 1897, struck oil and made the first discovery of oil according to the claims of the defendants in error.

Therefore, the precise question that is presented to this Court is: *Can there be any transfer or assignment of a mining location not perfected by discovery? In other words, can there be an assignment of the right to locate?*

Section 2320 of the Revised Statutes of the United States in effect provides that all locations must be based on discoveries, and the whole tenor of the statutes of the United States providing for the acquiring of title to mineral lands is to the effect that no rights whatsoever are acquired by or vested in a locator until an actual discovery has been made. And courts have so held. Some of the judges, in considering this particular point, have stated it to this effect, namely, that until discovery, the locator had nothing which the law recognized, excepting a mere license to explore, had no vested rights, no property, nothing which could pass by a conveyance, but that when a discovery was made, it related back to the

taking of the first step in making the location; provided *there were no intervening rights.*

Our contention, therefore, is that before discovery associate locators have no rights which they can convey to others. And as the seven associate locators of Miller had conveyed all their interests in the 160 acres to him before a discovery was made, no right or title vested in him upon the subsequent discovery of oil by his lessee, the Home Oil Company, other than a right to locate as an individual twenty acres of land.

In his dissenting opinion in this case (Record, page 127), Chief Justice Beatty, of the Supreme Court of the State of California, said:

> *"I dissent from the order denying a rehearing of this cause. There can be no location of a mining claim before discovery, and there can be no transfer or assignment of a location before the location is complete. There can, in other words, be no assignment of the right to locate.* If, in the expectation of discovery, an association of persons marks the boundary of a placer claim containing twenty acres for each associate, I have no doubt that they will be protected in their possession while they proceed with reasonable diligence to prospect the claim, and that by a discovery they will perfect it; *but if some of the associates withdraw before discovery or attempt to assign their claims to those who continue the work of development, those who remain will have no right to a claim greater in the aggregate than they could have taken by an original location."*

On the other hand, Mr. Justice Henshaw, speaking for the State Court, in disposing of our contention, says:

"It sufficiently appears from what has heretofore been said that a location such as this, made by eight associates, is but a single location, each associate having an individual eighth interest in the whole. It further appears that certain valuable rights become the property of such locators even before discovery. They have the right of possession against all intruders (*Garthe* vs. *Hart*, 73 Cal., 541), and they may defend this possession in the Court (*Richardson* vs. *McNulty*, 24 Cal., 339). They have, then, this right of possession and with it the right to protect their possession against all intrusion, and to work the land for the valuable minerals it is thought to contain.

"We cannnot perceive why these rights may not in good faith be made the subject of conveyance by the associates as well before as after discovery. There is certainly nothing in the express law upon the subject to lead to the view that this cannot be done, and there is much to give countenance to the contrary conviction. Thus the law expressly provides that if one of the co-locators abandons his claim or interest by refusing to bear his portion of the cost of the assessment work, such abandonment does not, as would be claimed, work the destruction of the whole location, 'but his interest in the claim shall become the property of his co-owners who have made the required expenditures.' (Rev. Stats., U. S., Sec. 2324.)

"It is to be borne in mind that a location such as this, though it contained 160 acres, is still a

single location, a single claim, with undivided interests covering the whole of it.

"Any work done upon the claim is done for the benefit of all the co-locators. It is undisputed that when the location has once been perfected one of the associates may by conveyance acquire all of the rights of his fellows, and we can perceive no reason why the right to prosecute the work and perfect such a location by discovery may not itself be vested in a single one of them. If, instead of conveying, the seven associates stood idle and refused to contribute their share to the necessary work of developing, and Miller under these circumstances had alone prosecuted the work to a successful discovery, no one could contend, in the face of Section 2324 of the Revised Statutes of the United States, but that Miller would have acquired the rights of all, and would have had a perfected location covering the whole 160 acres.

"If, then, by their abandonment, without a conveyance, Miller would have acquired the right to prosecute the work and perfect the whole location for himself individually, it is impossible to see why a conveyance to him of their right, instead of an abandonment of it by a refusal to join in the work, should effectuate any different result."

With the conclusion arrived at by the State Court from the above reasoning we beg to differ, and to suggest that it is contrary to established rules of law, to public policy and violative of the spirit and reason of the statutes governing the location of mining claims.

This is the first time, so far as we are able to ascertain after an exhaustive research, that this question has been squarely presented to any Court, and the decision blazes a new trail through the forest of mining law and establishes a precedent on which will be based in the future the title to many valuable mines. It is, therefore, of the most vital importance that such an important rule of property should be established only after the most exhaustive research and argument, so that it may be so firmly imbedded in law and reason as to forever withstand the assaults of sophistry and specious argument.

We submit that the conclusion arrived at by the State Court is the result of a misconception of the law and of reasoning by false analogism. For instance, it is said in the opinion: "It further appears " that certain valuable rights become the property of " such locators even before discovery. They have " the right of possession against all intruders and they " may defend this possession in the Court." (*Garthe* vs. *Hart*, 73 Cal., 541.)

In *Horswell* vs. *Ruiz*, 67 Cal., 111, the Court held that prior occupation and working of the mineral lands of the United States, without complying with the requirements of any law, either Federal, district or local custom, does not give a right of possession as against one who afterward peaceably locates a mining claim covering the same ground, and in all

respects complies with the Federal and district mining laws and regulations. From the time the second person has perfected his location the prior occupant is a trespasser.

The Court in *Adams* vs. *Crawford,* 116 Cal., 495, went even further, and held that the *discovery* of a mining claim vested no right or title to the property and was but one step in acquiring title. In that case, two persons made a joint discovery, but before completing the location by marking the boundaries thereof and recording the location notice other persons first completed a valid location of the same, and it was held that the title of the subsequent locators should prevail against the first discoverers of the claim.

The Supreme Court of the United States held in *Deffeback* vs. *Hawke,* 115 U. S., 392, that there was no color of title in a mere naked possession.

In *Beals* vs. *Cone,* 27 Colo., 473, it was held that until a discovery is made no rights are acquired by location.

> "Mere possession does not supply the place of a location or protect the possessor against a location peaceably made; and if the possessor permits in silence an intrusion upon his possession, and a location is peaceably made thereon, he cannot complain."
>
> 20 Am. & Eng. Ency. of Law (2d Ed.), p. 724.

"A prospector on the public mineral domain may protect himself in the possession of his *pedis possessionis* while he is searching for mineral. His possession is held good as a possessory title against all the world except the Government of the United tSates. But if he stands by and allows others to enter upon his claim and first discover mineral in rock in place, the law gives such first discoverer a title to the mineral so first discovered, against which the mere possession of the surface cannot prevail."

Crossman vs. *Pendery*, 8 Fed. Rep., 694, per Justice Miller.

"Every competent locator has the right to initiate a lawful claim to unappropriated public land by a peaceable adverse entry upon it while it is in the possession of those who have no superior right to acquire the title or to hold the possession. *Any other rule would make the wrongful occupation of the public land by a trespasser superior in right to a lawful entry of it under the Acts of Congress by a competent locator*" (p. 279).

Thallman vs. *Thomas*, 111 Fed. Rep., 277.

In that case the complainants were in the possession of a ledge under the ground in dispute and actually and actively engaged in extracting ore therefrom when the defendant, who was in the employ of the complaintant as shift boss, learning that the workings had extended beyond the boundaries of its claim,

went upon the surface of the adjoining land and made a location.

"Possession without a location carries no title. Possessory titles do not live upon possession alone. They must be supported by proof of a compliance with the law that gives the right to and sustains the possession. The mere naked possession of a mining claim upon the public land is not sufficient to hold such claim as against a subsequent location made in pursuance of the law and kept alive by a compliance therewith."

Patterson vs. *Tarbell,* 26 Oregon, 34, quoting Chief Justice Wade.

"The right of possession comes only from a valid location."

Lindley on Mines (2d Ed.), Sec. 218, p. 376.

"The mere evidence of staking boundaries is not proof of possession."

Boardman vs. *Thompson,* 3 Mont., 387.

In *Olive Co.* vs. *Olmstead,* 103 Fed. Rep., at page 572, the Court, in speaking of placer claims, said:

"One of the essential conditions to the making of a valid location of unappropriated public land of the United States under the mining laws is a discovery of mineral within the limits of the claim." (Citing many Federal Court and Department decisions.)

. . . . . .

"It is clear that the location (placer) in con-

troversy . . . amounted to nothing for the reason that no discovery . . . had been made. . . . It is not pretended that the defendants . . . remained in the actual possession of any part of the premises, and if they had, the law is well settled that the mere occupancy of the public land and improvements thereon gave no vested right therein . . . The defendant . . . had made no such location as prevented the lands from *being in law, vacant.*

"Others had the right to enter upon the lands for the purpose of taking them up under the mining laws, if it could be done peaceably and without force, or to acquire the government title thereto by any other legal means. (Citing *Sparks* vs. *Pierce,* 115 U. S., 408, 413; . . . *Garthe* vs. *Hart,* 73 Cal., 541, and others.)"

"It cannot be said that a mere naked possession, without any attempt to comply with any of the laws of the United States, will reserve the land possessed from location, *even for an instant.*"

Snyder on Mines, Sec. 236, p. 204.

The rights possessed by locators on pre-emption claims to public land and those on mining claims should not be confounded. There is a distinction between them which was long ago recognized by this Court. In *Du Pratt* vs. *James,* 65 Cal., at page 556, it was said: "It has been held by the Supreme Court "of the United States, and by this Court, that a per- "son cannot enter upon the actual possession of an- "other for the purpose of laying a foundation for a

"pre-emption claim to public land of the United "States; and it is claimed by the appellant that the "*same principle* operated upon the parties to this "controversy, and the defendant could not lawfully "enter upon the possession of the plaintiff and make "a valid location, nor acquire any right as against "the plaintiff; that the defendants could not, by a "trespass, lay a foundation for obtaining the bene- "fit of the Act of Congress for the location of min- "ing claims . . . but we think a close exam- "ination of the Act of Congress (Rev. Stats., 2322 "and 2324) shows the reverse to be the better view."

As recently as 1901 the Court, in *Tuolumne Cons. Mg. Co.* vs. *Maier,* 134 Cal., 583, 585, 586, held as follows:

> "We take it to be the conceded law that there can be no valid location of a mining claim without an actual mineral discovery thereon, and for the purposes of this case it is unnecessary to decide whether such discovery must precede the posting and filing of the notices; for it may be here conceded that a previous location may be made valid by a subsequent discovery of mineral: *still there can be no valid claim to the land, and it must be treated as government land up to the time of such discovery.*"
>
> . . . . . .
>
> "Treating the land, then, as government land the time of the construction across it of appellant's ditch, whatever right may have been acquired in it by subsequent discoveries of mineral was subject to the easement of plaintiff's ditch, and to his

rights as a prior appropriator. (*Smith* vs. *Hawkins,* 110 Cal., 125; *Broder* vs. *Water Co.,* 101 U. S., 275.)"

There are innumerable other authorities to the same effect as the foregoing, but we deem it unnecessary to cite further.

Inasmuch as the foregoing authorities establish that a person in the mere naked possession of a mining claim has no color of title thereto, we feel that the Court erred in holding that the associates of Miller could convey to him before discovery such an interest as would vest in him title to 160 acres after a discovery had been made. We believe that prior to discovery they had no interest in the land which was susceptible of transfer. They each held merely an inchoate right to an undivided one-eighth interest in a tract of 160 acres of land which would be perfected upon a discovery being made thereon during the continuance of the association. This right was dependant upon the possession and working of the claim in good faith, and only secured to them the protection of the law against trespassers. If they permitted other parties to enter upon the land and such parties made a discovery of mineral and within the time allowed by law otherwise perfected their location, all rights of Miller and his associates, if there were eight persons associated in the subsequent location, would cease and they would become trespassers as against

the latter. If, however, there was but one subsequent locator, he would be entitled to but twenty acres of land immediately surrounding his discovery, and the right to prospect the remaining 140 acres would still remain in Miller and his associates. In other words, the territory to which their right attached would diminish in the proportion of twenty acres to each person associated in the subsequent location. Such would be the result in a placer location, and in that respect it differs from a lode location. In the latter, no matter how many claimants might be associated, the maximum amount of land that could be located is an area 1500x600 feet, and if the subsequent locators numbered one or a dozen the result would be the same, viz.: the entire claim of the first locators would cease and title thereto vest in the subsequent locators. This difference in results is due to the distinction made by the statutes between placer and lode locations. In the former class of claims each individual is limited to a twenty acre tract as a maximum claim, and an association of more than one and not more than eight persons can locate a claim not exceeding in the aggregate a number of acres equivalent to twenty acres for each locator.

Revised Statutes, U. S. Secs. 2329-2330.
Union Oil Co., (on review), 25 L. D., 358.
McDonald vs. *Montana Wood Co.*, 35 Pac. Rep., 668.

Lindley on Mines (2d Ed.), Sec. 438.
Kirk vs. *Meldrum,* 28 Colo., 453.

Keping in mind this fact, and the further fact that a valid location of a mining claim, either lode or placer, is originated only by a discovery, it would seem that the size of the claim of subsequent locators of a placer claim who make a discovery is fixed by the number of persons associated in such location at the time of discovery, and the quantity of land lost by the original claimants who have made no discovery, is measured by the same standard. The quantity of land which the original association could take upon a discovery should, therefore, be limited as against the government and the public in general to twenty acres for each person in the association *at the time of their discovery.*

The mere marking of the boundaries of a claim upon the ground and the posting of a notice of location confer upon the person so doing no valid claim to the land marked and do not result in the acquisition of title thereto from the government. Such acts merely constitute notice that the person has exercised the license given him by the government to search for mineral in the tract of land specified in the notice. This license is both conditional and exclusive. It is conditional upon the active and continuous prosecution of his search for mineral and made exclusive by the protection afforded him by the Courts while

he is so engaged against harrassment or trespass by others. Should he fail to prosecute his search the ground is open to the next comer. This person, by posting a new notice of location and continuing the search, acquires the license formerly possessed by the other. A transfer of this license or privilege cannot be made, because it is purely personal and continues only while actually exercised. An attempted transfer thereof would convey no additional right or any other thing of value to the purchaser, because the latter always possessed the right, independent of any act of the seller, to enter upon, locate and work the claim the instant it was abandoned. The seller had nothing to convey, because the Government had parted with no title or estate in the premises to him. The United States retains title to the land until a discovery of mineral has been made made thereon. All that the seller would convey to the purchaser by the attempted transfer would be the information that he had abandoned his license and that it might be exercised by the purchaser. A deed of conveyance would not constitute a muniment of title, but would merely be valuable as evidence that the seller had abandoned his license. So in the case at bar, the grantees of Miller had no estate or interest on the land, but merely a license to continue in possession thereof while searching for mineral thereon. The fact that an association of eight had acquired the privilege to

search for mineral upon a tract of land eight times greater in area than that to which an individual could obtain the privilege only had the effect of changing the exclusive privilege of each to prospect upon twenty acres of land into the privilege of prospecting jointly with seven others a tract containing 160 acres. No estate was thereby conveyed to any of them by the Government, nor was the non-assignable character of the license changed.

There is in the statute no words granting the tract of land before discovery of mineral thereon, nor any words by which any estate or interest in it is raised by implication. The Courts, however, have by construction, given the prospector a mere naked license to enter upon the unappropriated public land of the United States, and protect him while exercising such license from trespassers.

> "A license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act, which without it, would be unlawful, and while it remains unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death of either party, and cannot be transferred or alienated by the licensee because it is a personal matter, and is limited to the original parties to it. A sale of the lands by the

owners instantly works its revocation, and in no sense is it property descendible to heirs."

De Haro vs. *United States,* 5 Wall., 599, 627.

"One may extend a license to the general public, as for instance, by opening a public place of business or throwing open his land so that all who will may enter."

18 Am. & Eng. Ency. of Law (2d Ed.), p. 1139, and authorities cited at p. 1134.

This the Government of the United States, under the construction given the statute by the Courts has done to all who wish to prospect for precious metals on its unappropriated public lands. No estate or interest in said land is conveyed, however, to any person other than a mere naked license, which is revocable at the will of the Government and terminates on the transfer of the land.

When a discovery of mineral has been made an estate is vested in the discoverer upon his compliance with the provisions of the statute relative to marking of boundaries, recording, etc., which termniates all prior licenses granted therein, which is good as against all persons and constitutes an estate of inheritance to all intents and purposes.

A valid location in compliance with the requirements of law has the effect of a grant from the government of the right to the exclusive possession of the

lands located and constitutes an estate of inheritance to all intents and purposes.

Gaylord vs. *Place*, 98 Cal., 472.
Forbes vs. *Gracy*, 94 U. S., 762.
Seymour vs. *Fisher*, 16 Colo., 188.
Atkins vs. *Hendree*, 1 Idaho, 95.
Hopkins vs. *Noyes*, 4 Mont., 556.

We believe that our view of the law is sustained by the United States Circuit Court in *Nevada Sierra Oil Co.* vs. *Home Oil Company*, 98 Fed. Rep., p. 676. There Judge Ross, in speaking of a transfer made by one Barrett to one Miller, of an oil location upon which no discovery had been made, and the subsequent abandonment of the same by Miller, said: "He later undertook to transfer the same thing "(which was nothing) to defendant Miller, who "later undertook to relinquish to the United States "*what he did not have, namely, a right to the land* "*in question.*"

Why? Because there was no discovery. Holding, in fact, that no estate is acquired until discovery, and conflicting directly with the opinion of the State Court in this case.

Section 2319 of the Revised Statutes of the United States says:

"All valuable mineral deposits in lands belonging to the United States are hereby declared to be

free and open to exploration and purchase, and the lands in which they are found to occupation and purchase . . . under regulations prescribed by law."

Section 2320 says:

"Mining claims upon veins . . . whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; *but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.*" (The italics are ours.)

Sections 2330 and 2331 provide that an association of not less than eight persons can locate not more than 160 acres as a placer claim and limit the area of such claim for each individual locator to twenty acres.

In construing these Sections the Courts have laid down the rule that if a person monuments, stakes or otherwise marks the exterior boundaries of his claim before discovery, a subsequent discovery of mineral within those boundaries operates as an appropriation of the land marked if other rights have not intervened, and it is further held that no mining right has intervened unless the claimant thereof has made a discovery of mineral on the land. As soon as the subsequent location is perfected the first locator becomes a trespasser. (*Crossman* vs. *Pendery,* 8 Fed. Rep., 693, and other authorities cited, *supra.*) In other

words, the mere *license* of the first prospector was revoked when the discovery of mineral by the second person operated as a conveyance to him by the Government of an *estate* in the land located. As heretofore stated, if the subsequent discovery was peaceably made by one person on a tract of 160 acres being prospected by eight associates, he would be limited to an estate not exceeding 20 acres immediately surrounding his discovery; if made by any number of persons not exceeding eight, an estate would be acquired in and to a tract not exceeding twenty acres for each person associated at the time of the discovery. In other words, the quantity of land to which title could be acquired as against the original licensees would be determined by the number of *bona fide* discoverers. So, too, if the discovery was first made by the original licensees after marking the boundaries of 160 acres, and while others were engaged with their consent in prospecting the ground, we contend that the number of acres they could hold as against the others would be determined by the number of *bona fide* associates at the time the discovery was made.

The license given to a prospector upon unappropriated Government land ceases whenever the Government by any method conveys the land to another. It also ceases upon the death of the licensee. It is not an interest or estate in the land that will descend

to his heirs. If an association of eight persons locates 160 acres of land, and before a discovery is made thereon one of the number dies, the heirs of the deceased can claim no estate in the location. Neither could the remaining seven locators, upon a discovery of mineral, acquire title to the whole 160 acres, for the law of survivorship does not obtain as to licensees. The statute limits the number of acres to twenty for each person, and consequently a remarking of 140 acres would have to be made. If by death or otherwise the association was reduced to a single individual before discovery, the survivor could acquire title to but twenty acres. If they all died before a discovery was made the land became vacant, and no right, interest or license in and to the same vested in any one other than the Government. The heirs of the last survivor acquired no interest in or to any portion thereof.

After a discovery has been made upon unappropriated Government land, and the law in other respects has been complied with, the situation is different. An estate has vested in the locator, which can be disposed of in any manner known to the law. If he should die his heirs succeed to the same, and upon taking the necessary steps can obtain patent thereto from the United States. And this is the case whether the location was made as an individual or jointly with others.

When the discovery has been jointly made upon placer ground an estate vests in each of the locators of an undivided interest in the claim, the extent of which is determined by the number of persons associated in the discovery. Such individual interest is property capable of being transferred and transmissible to one's heirs. Whatever may be the number of acres less than 160 that are located, there is but *one claim,* in which each person has an undivided interest. To protect the entire claim the law requires that labor to the amount of $100 shall be done thereon each year. Failure to perform this amount of work upon the claim destroys the estate of each and every locator thereon. To protect the vested estate of each and every one of the joint locators in said claim prior to issuance of patent, and to prevent the interest of any one being destroyed by the failure of the other to do his proportion of the required annual work, the statute (Sec. 2324), as stated in the opinion of the State Court "provides that if one of the co-locators " abandons his claim or interest by refusing to bear " his portion of the cost of the assessment work, such " abandonment does not, as would be claimed, work " the destruction of the whole location, but his inter- " est in the claim shall become the property of his co- " owners who have made the required expenditures."

(In the statute the word "co-locators," in the first line of the quotation, reads "co-owners.")

In the opinion in this case the last mentioned section of the Revised Statutes of the United States is cited as giving countenance to the conclusion that before discovery a locator has a right which is the subject of conveyance. We feel that the Court overlooked the distinction between the license of a prospector prior to a discovery and the estate which vests in him upon making a discovery, which has been referred to above. This distinction is observed in the statute, for therein, in the same section it is said "the *claim or mine* upon which such fail-"ure occurred shall be open to re-location in "the same manner as if no location of the same "had ever been made, provided that the original "locators, their *heirs, assigns or legal representatives,* "have not resumed work upon the *claim* after failure 'and before such location." (Italics are ours.)

We further submit that the section of the statute quoted refers to claims upon which a discovery has been made, for the reason that it provides that "upon "the failure of any one of several *co-owners* to con-"tribute his proportion of the expenditures . . . "the *co-owners* who have performed the labor, etc." Before a discovery a prospector is not an *owner.* The Government is the *owner.* The prospector is a mere licensee.

We also suggest that the provisions of Section 2324, Revised Statutes of the United States, relative to the

performance of annual assessment work upon claims do not refer to locations upon which a discovery has not been made. A prospector's right to possession is not dependent upon the performance of assessment work. It depends upon *pedis possessio.* If a person made a discovery upon a location to-day he would have until January 1st, 1906, within which to perform one hundred dollars' worth of labor, and no matter where he might be, the Courts would, in the absence of an express abandonment by him, protect his title to such claim. Should one absent himself for that period from a location upon which no discovery had been made, it would operate as an abandonment of any right he might have had. (*Ferris* vs. *Coover,* 10 Cal., 589, 632; *Belk* vs. *Meagher,* 104 U. S., 279, 283.) The location would not be such as would prevent the lands from being in law vacant. (*Olive Co.* vs. *Olmstead,* 103 Fed. Rep., p. 572.)

We submit that if the decision under discussion is to become the law, it would contravene the express policy of the United States and nullify the statutes limiting a placer claim to twenty acres for a single individual. No longer would a locator content himself with a twenty-acre claim when the law would sanction the use by him of the names of seven accommodating friends who would permit the use of their names to enable him to locate 160 acres of land, and immediately transfer to him all their interests in and

to the same. It is the policy of the Government to discourage all attempts on the part of an individual to appropriate by the use of "dummies" more ground than he is permitted under the law to locate as an individual, and in the light of such policy, the Court should favor a construction of the statutes which would tend to promote it as against one which would foster and encourage its evasion.

Before concluding, we would state that the statement in the opinion, "that Miller, his associates and "lessees remained in possession of the land, and "with diligence and with great expense prosecuted "the work of boring wells," is not sustained by the evidence. It is shown without contradiction that on the 31st day of December, 1896, Miller, and his associates only posted a location notice and attempted to mark the boundaries of the claim. They immediately, and without making a discovery of oil, left the premises and made no attempt at any time to do anything further on the land. In July, 1897, the seven associates of Miller transferred their interests to him and he executed on Septembr 17th, 1897, a lease of the said premises for a term of ten years to one Frank Barrett, who on the same day assigned the same to the Home Oil Company. The latter entered upon the premises and in October, 1897, made a discovery of oil. The only work done upon the claim was that of the Home Oil Company. Miller

and his associates did no work upon the land prior to the lease made to the Home Oil Company, nine and one-half months after the location. They attempted to appropriate and hold the land for purely speculative purposes, and it seems were successful in the attempt. Their actions in respect to the land does not contrast favorably with those of the defendants Chrisman, who each made a discovery of oil upon the tract, located the same on January 1st, 1897, did not use any of his friends' names to increase the size of his claim, but contented himself with locating twenty acres immediately surrounding his discovery, built a cabin upon the claim, lived there and remained in actual occupancy, engaged in working the ground, until after the discovery of oil by the lessees of Miller in October, 1897.

Mr. Chief Justice Fuller, speaking for the Court in *St. Louis Min. Co.* vs. *Montana Min. Co.*, 171 U. S., 650, at page 655, said:

> "Where there is a *valid* location of a mining claim, the area becomes segregated from the public domain and the property of the locator. There is no inhibition in the Mineral Lands Act against alienation, and he may sell it, mortgage it or part with the whole or any portion of it as he may see fit."

This Court is now asked to extend the foregoing rule to the case where the location is not perfected by discovery.

We respectfully submit that until a location is *perfected by discovery,* it cannot be transferred or assigned and we base our contention upon the decisions of this Court.

In *Belk* vs. *Meagher,* 104 U. S., 279, it is said at page 283:

> "A mining claim *perfected under the law* is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent."

The language of the Court in the case of *Noyes* vs. *Mantle,* 127 U. S., 348, is so applicable to this case that we cannot do better than to quote therefrom. At page 351, Mr. Justice Field said:

> "Section 2322 of the Revised Statutes declares that the locators of mining locations previously made or which should thereafter be made, on any mineral claim, vein, lode or ledge on the public domain, there heirs or assigns, where no adverse claim existed on the 10th of May, 1872, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations so long as they comply with the laws of the United States and with State, territorial and local regulations not in conflict with those laws governing their possessory title. *There is no pretense in this case that the original locators did not comply with all the requirements of the law in making the location of the pay streak lode mining claim,* or that the claim was ever abandoned or forfeited. *They were the discoverers of the claim.* They marked its boundaries by stakes,

so that they could readily be traced. They posted the required notice, which was duly recorded in compliance with the regulations of the district. *They had thus done all that was necessary under the law for the acquisition of an exclusive right to the possession and enjoyment to the ground.* The claim *was thenceforth their property.*"

Plaintiffs in error respectfully insist that the judgment of the Supreme Court of the State of California ought to be reversed, with directions to such Court to order the Superior Court of the County of Fresno to render judgment in favor of plaintiffs in error herein, the defendants in such State Courts.

Respectfuly submitted,

JOSEPH D. CAMPBELL,
WILLIAM H. METSON,
FRANK C. DREW.

PHILIP MANSFIELD,
Of Counsel.

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JAMES H. McKENNEY,
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No. 171.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1904.

A. Y. CHRISMAN et al.,

Plaintiffs in Error,

vs.

E. O. MILLER et al.,

Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR

In Opposition to Dismiss or Affirm.

JOSEPH C. CAMPBELL,
WILLIAM H. METSON,
Attorneys for Plaintiffs in Error.

The James H. Barry Co.

In the Supreme Court of the United States

A. Y. CHRISMAN, ET AL.,
Plaintiffs-in-Error,

vs.

E. O. MILLER, ET AL.,
Defendants-in-Error.

Brief for Plaintiffs-in-Error in Opposition to Motion to Dismiss or Affirm.

STATEMENT OF THE CASE.

June 14th, 1895, an association composed of Barieau, F. Barrett, Brown, McLean, Campbell, Bright, McClurg and H. Barrett, posted a notice of location on the northeast quarter of Section 20, Township 19 South, Range 15 East, Mount Diablo Base, in the State of California, claiming the same as a placer (oil) mining claim. (Record, p. 65.) At the time of location, petroleum was observed on this ground, oil mixed with water running out of a spring (p. 68). January 2d, 1896, the ground was surveyed and the boundaries marked (p. 65).

These locators, on the 24th of December, 1896, conveyed to the Producers and Consumers Oil Company, which in turn quitclaimed to the defendant-in-error, Miller, on the same day (p. 26). On the 29th of December, 1896, Miller executed a document by which he purported to "release, abandon, and re-" convey unto the United States of America, all right " in and to said land acquired under and by virute of " the location," made by Barieau and associates. This "abandonment" was recorded on December 31st, 1896, at *3 o'clock P. M.* (p. 44). On the *forenoon* of December 31st, 1896, Miller posted a notice of location of this ground on behalf of himself, W. Hall, L. Hall, Biddle, Hannah, Overall, Levinson and Smith, and marked the boundaries (pp. 39-41)..

January 1st, 1897, the plaintiff-in-error, H. T. Chrisman, posted notice of location on, and marked the boundaries of a portion of this quarter-section, (pp. 70-72), and the other plaintiff-in-error posted a notice upon, and marked the boundaries of another portion of the same (pp. 79-81). Before posting, they had discovered seepages of oil on the land (pp. 78 and 82).

July 31st, 1897, Miller's associates conveyed their interests under their location to him (p. 47). Miller subsequently leased to Barrett, who assigned to the Home Oil Company (p. 23). The Home Oil Company struck oil in September, 1897 (p. 60). This

was the first discovery of oil under the Miller location (pp. 24 and 25).

The action is to quiet title as against the Chrisman locations.

BRIEF OF ARGUMENT.

I.

IT APPEARS FROM THE RECORD THAT A FEDERAL QUESTION WAS PRESENTED FOR DECISION BY THE STATE COURT, THAT ITS DECISION WAS NECESSARY TO THE DETERMINATION OF THE CAUSE, AND THAT IT WAS ACTUALLY DECIDED AGAINST PLAINTIFFS-IN-ERROR, WHO CLAIMED A RIGHT UNDER THE FEDERAL LAWS.

In the state courts it was contended by these plaintiffs-in-error as is shown by the record:

First. That the "Barieau location" of June 14th, 1895, was valid, being distinctly marked on the ground so that its boundaries could be readily traced, and having been made after discovery of oil within its limits, and that it was existing on the 31st of December, 1896, when the "Miller location" was made;

Second. That the abandonment of the "Barieau location" by Miller, the grantee thereof, was of no avail to give the "Miller location" validity;

Third. That on January 1st, 1897, when the "Chrisman locations" were made, the land was free and open to exploration, and was a portion of the public domain of the United States;

Fourth. That the "Chrisman locations" were valid, being distinctly marked on the ground so that their boundaries could be readily traced, and having been made after discovery of oil within their limits; and

Fifth. That discovery of oil by Miller after conveyance to him by his associated locators, would not avail to perfect the location of more than twenty acres, which he as an individual claimant, was entitled to locate.

In reference to the Barieau location, the trial Court found:

"That on the 14th day of June, 1895, certain per-
"sons * * * *pretended to make*" upon the lands in controversy, "a mineral location" (p. 26), that certain of said persons "were not *citizens of the United* "*States,* nor were they, or either of them, qualified to "make a mineral location under the laws of the "United States and the laws of the State of Cali-"fornia, and said persons *did not in fact make said* "*mineral location*" (p. 27), and that these persons "did not on the 14th day of June, 1895, or on any day "whatsoever, *under and in pursuance of the laws* of "the United States, governing the locating and ap-"propriating of the mineral lands of the United "States, *locate* the lands and premises described in "plaintiffs' complaint or any part of said lands and "premises as a placer mining claim" (p. 29).

There is absolutely not a word of evidence as to the

political status of the persons whom the Court found were not citizens, but even if that finding were based on evidence, so far as this action is concerned, that fact could not have affected the validity of the location. As was said by the Circuit Court of Appeals in the Ninth Circuit in *Tornanses* vs. *Melsing* (109 Fed., 710): "The question whether or not a loca-" tion of a mining claim by an alien may be attacked " in a suit between private parties, has, whenever it " has arisen, been answered in the negative by the " decisions of the courts of the United States."

The evidence showed, without conflict, that June 14th, 1895, the Barieau association posted their notice, recorded the notice July 16th, 1895, and surveyed the land and marked the boundaries January 2nd, 1896, and that during this time no outside rights intervened (pp. 64-66, 67-68, 52-55).

There is but one element left which could have affected the validity of this location—that is to say, discovery. The facts which plaintiffs-in-error contend constituted a discovery are undisputed. Barieau testified: "I saw some indications of oil on this " northeast quarter in 1895, in June, and frequently " since. * * It comes out with the water, floats " on the water. There is a permanent spring there, " especially in the summer when it is hot. The oil " runs there in the summer. * * In June, 1895, there " was a little water with oil, and a little oil with water " coming out" (p. 68). *This evidence was not con-*

tradicted. In plaintiff's case in rebuttal, the witness Doheny testified that he had examined the land in April, *1899—almost four years after this location*—sufficiently to satisfy himself that "there was not any oil in the soil" (p. 97); the witness Poston testified that in July and August, *1898,* he saw no indications of oil in the vicinity (p. 98), and the witness Chandler testified that in April, *1899,* while he was on the land, *not looking for oil, but for water,* he did not see any signs of oil (p. 99). The observations of these witnesses, it must be remembered, were made after the Home Oil Co. had bored its wells and pumped oil out of this quarter section. This would naturally tend to diminish the pressure in natural wells. The Supreme Court of the State also held that the evidence of discovery was uncontradicted: "*Upon the* "*question of discovery the sole evidence is that of* "*Barieau himself*" (p. 122).

The facts being uncontradicted, there was left to the Court's determination a pure question of law: Did these facts constitute a discovery within the meaning of the federal statute? And the Court determined that they did not.

It is to be noticed that the Court's decision of this question, though placed among the findings of fact, is throughout, a conclusion of law; thus, they "pre-" tended to make a location"; "nor were they quali-" fied to make a location" and "did not * * under " and in pursuance of the laws of the United States,

"locate the land." There is no finding of what they did, but the legal conclusion that their acts resulted in an invalid location.

The Court, in holding the location to be invalid, necessarily decided as did the Supreme Court, that such seepage of oil was not a discovery within the meaning of the statute.

But this was purely a federal question; it involved the construction of a federal statute under which these plaintiffs-in-error asserted their right, and the question was determined against them. There was "drawn in question the validity of * * an au-"thority exercised under the United States," and the decision was against the validity.

In *Nevada Sierra Oil Co.* vs. *Miller,* 97 Fed., 681, 688, His Honor, Judge Ross, said: "According to "the averments of this bill, there lies, at the very "foundation of the case, the question as to whether "there was a discovery of any mineral deposit, with-"in the limits of the claim in controversy, prior to its "location by the predecessors in interest of the com-"plainant. (Rev. St., Sections 2320, 2329.) With-"out a valid discovery of mineral within the limits "of the claim, there could be no valid location of the "ground as a placer mining claim. That is clear, "and no one, I apprehend, will dispute it. That "question, therefore, not only enters into the essence "of the complainant's cause of action, but constitutes "its foundation stone. The facts constituting the al-

"leged discovery are stated at large in the present "bill. The statute authorizing the location of a "placer *mining* claim upon the public land, after "discovery of a mineral deposit within its limits, "does not declare what shall constitute a discovery. "Whether or not the finding of seepages of oil, and "its residuum, upon a given piece of public land and "upon the lands adjoining it on different sides, and "the finding thereon of shale and oil-bearing sand "rock of a character similar to that in which petro-"leum in large and paying quantities had been found "and developed in the vicinity, which veins and "strata extend to and across the ground in question, "manifestly depends upon the application and true "construction of the laws of the United States."

Furthermore, the decision of the entire case hung upon this question. If Barieau's discovery was sufficient, that location was good. The Miller location was made *before* the Barieau location was abandoned (Finding XXXIV, p. 30)—conceding for the present that an abandonment prior to the Miller location could have been effective. If Barieau's discovery were sufficient, Miller's location was void in its inception and could never have been validated by subsequent acts. "A location, to be good, must be good "when made." (Snyder on Mines, Sec. 156). If the Miller location were void, the Chrisman locations were good, and the case was on all fours with *Belk* vs. *Meagher,* 104 U. S., 279. We quote the facts

from the syllabus: "A. entered Dec. 19, 1876, upon "a claim not then in the actual possession of any one, "but covered by a valid and subsisting location "which did not expire until the first day of Janu- "ary thereafter. Between the date of his entry and "February 21, 1877, he made no improvements or "enclosure, and did a very small amount of work, "but had no other title than such as arose from his "attempted location of the claim and his occasional "labor upon it. On the last-mentioned date, B. en- "tered upon the property peaceably and in good "faith, and did all that was required to protect his "right to the exclusive possession thereof. A. "brought ejectment."

This Court say: "Mining claims are not open to "re-location until the rights of a former locator have "come to an end. A re-locator seeks to avail him- "self of mineral in the public lands which another "has discovered. This he cannot do until the dis- "coverer has in law abandoned his claim, and left "the property open for another to take up. The "right of location upon the mineral lands of the "United States is a privilege granted by Congress, "but it can only be exercised within the limits pre- "scribed by the grant. A location can only be made "where the law allows it to be done. Any attempt "to go beyond that will be of no avail. Hence, a "re-location on lands actually covered at the time by "another valid and subsisting location is void; and

" this not only against the prior locator, but all the " world, because the law allows no such thing to be " done. It follows that the re-location of Belk was " invalid at the time it was made, and continued to " be so until January 1, 1877. The next inquiry is, " whether the attempted location in December be- " came operative on the first of January, so as to give " Belk the exclusive right to the possession and en- " joyment of the claim after that. We think it did " not. The right to the possession comes only from " a valid location. Consequently, if there is no loca- " tion, there can be no possession under it."

In regard to the Chrisman locations, the Court found: "That said defendant, A. Y. Chrisman, never " at any time discovered a seepage of petroleum or " other mineral oil upon said land or any part there- " of, and the defendant, H. T. Chrisman, never dis- " covered a seepage of petroleum or other mineral oil " upon said land or upon any part thereof" (p. 25), but this finding is not supported by the evidence. H. T. Chrisman testified: "Q. Well, did you make " any search before placing this notice up there for " any evidences of mineral, petroleum or oil? A. " It wasn't necessary. As soon as I went there, I saw " some. Q. Where did you see it? A. On the " southeast corner of the northeast quarter. On my " claim. Q. Have you ever searched on the claim " known as your father's (A. Y. Chrisman, see p. 79) " claim, whether there was anything discovered there

"or not? A. I have looked over it lots of times, "but long before that time. There is one place up "there where the oil is almost oozing out of the "rocks; looks very oily; nearest prospect of oil I "have ever seen there" (p. 75). A. Y. Chrisman testified: "Before placing the notice there, 'mining "location,' I made an examination as to the presence "of any petroleum or oil on these two claims. Near "the east line of the northeast quarter there is a gulch "comes down there, and a little oil seeps out with the "water and comes out in that gulch there; in relation "to my boy's claim, that would be just inside the "southeast corner of his claim; would be on his "claim. I made a discovery on my claim near the "north line, inside of my claim, in January, 1897, "after I had posted the notice; before I had posted "my notice, I noticed strong evidences of oil there "on my claim, black shale cropping out in places" (p. 82). The only evidence in rebuttal is that already quoted of the witnesses Doheny, Poston and Chandler, all to the effect that *they saw no signs* of oil at times far distant from the time of these locations, and, as we have already shown, after the pressure in this natural spring had been lessened.

Counsel for defendants-in-error contends that these findings must be conclusive on this Court on writ of error. But findings are conclusive only when the evidence is conflicting, not when there is a total failure of evidence to sustain them.

See:

Laing vs. *Rigney*, 100 U. S., 531, 540.
Ward vs. *Joslin*, 186 U. S., 142.
Dooley vs. *Pease*, 180 U. S., 126.
Runkle vs. *Burnham*, 153 U. S., 210.
Case Mfg. Co. vs. *Soxman*, 138 U. S., 431.
Hathaway vs. *Bank*, 134 U. S., 494.
Lehnen vs. *Dickson*, 148 U. S., 71.
The Francis Wright, 105 U. S., 381.
Eastman vs. *Currey*, 48 Pac., 310.

There is no conflict in the evidence that the Chrismans posted and recorded their notices and marked the boundaries of their locations, or that they performed the annual assessment work (pp. 70-75, 79-82, 86-87), consequently the XVIIIth finding (p. 25) is not sustained by the evidence.

The trial Court held both the Barieau and the Chrisman locations invalid only by reason of the insufficiency of the discovery. This insufficiency was not a question of fact, but one of law.

Counsel for defendant-in-error seems to be of opinion that the federal question must be presented in the State Court in some solemn and formal manner, which must appear in the record. Such is not the law as enunciated by this Court. It is sufficient if it appears that a determination of such question was necessarily made in the Court's decision.

"This Court has had frequent occasion to hold

"that it is not always necessary that the federal ques-
"tion should appear affirmatively on the record or
"in the opinion if an adjudication of such question
"was necessarily involved in the disposition of the
"case by the State Court."

Kaukauna Co. vs. *Green Bay, etc., Canal,* 142 U. S., 254, 269.

Citing:

Armstrong vs. *Athens County,* 10 Pet., 281.
Willson vs. *Blackbird Creek Marsh Co.,* 2 Pet., 245.
Chicago Life Ins. Co. vs. *Needles,* 113 U. S., 574.
Eureka Lake Co. vs. *Yuba County,* 116 U. S., 410.

But it formally appears in the record that the federal question was raised in and decided by the State Court. In the opinion, it is said: "The two require-
"ments admittedly essential to the validity of a loca-
"tion such as this, are that the location must be dis-
"tinctly marked upon the ground so that the boun-
"daries can be readily traced, and that there must be
"a discovery of minerals within the limits of the
"land located (Rev. Stat. U. S., Sec. 2324). *Upon*
"*the question of discovery the sole evidence is that of*
"*Barieau himself.* * * *We think it clear that such*
"*testimony does not establish a discovery within the*

" *meaning of the law.* To constitute a discovery, the " law requires something more than a conjecture, ex- " pectation, hope or even indications" (p. 122).

As was said by this Court in *Republican River Bridge Co.* vs. *Kansas Pacific Ry. Co.* (92 U. S., 315): "When a right is set up under an Act of Con- " gress in a State Court, any matter of law found in " the record, decided by the highest Court of the " State, bearing on the right so set up under the Act " of Congress, can be re-examined here."

If the validity of the Barieau location was not essential to the Court's decision, it was so only by reason of the abandonment of that location by Miller, the transferee. But in that case the effect of the abandonment—itself a federal question—must have been determined.

Another federal question was necessarily involved in the determination of this cause and was decided against plaintiffs-in-error, that is to say, that the conveyance to Miller, by his associated locators, made prior to discovery, vested no title in him; that subsequent discovery by him could have served to perfect only such location as he could have made as an individual, viz., twenty acres, and that the one hundred and sixty-acre tract never having been subdivided, it was impossible for him to perfect an undivided interest in the association claim.

The Court must have necessarily held that plaintiffs' title was derived from this location, and that

the location was perfected when, subsequent to conveyance to Miller, discovery was made. The cause could not have been decided without a determination of this question.

That this question was urged and determined adversely to plaintiffs-in-error, appears from the opinion of the State Supreme Court (p. 126). It was by reason of the existence of this question that the Chief Justice dissented from the order denying a rehearing (p. 128).

Counsel for defendants in error, however, urges that this question was presented solely by the intervenor in the State Court; that the intervenor is not a plaintiff in error here, and that consequently these plaintiffs in error cannot raise the question in this Court.

This contention is not true in fact. The question was presented on argument to the State Supreme Court as appears from page 13 of the printed "Argument of Mr. Metson on behalf of Appellants," of which a duly authenticated copy is herewith presented.

But, even it if were true, the State statute permitting interventions (California Code of Civil Procedure, Sec. 387) provides that "Any person may be-
"fore the trial, intervene in an action or proceeding,
"who has an interest in the matter in litigation, in
"the success of either of the parties, or an interest
"against both. An intervention takes place when

" a third person is permitted to become a party to an " action or proceeding between other persons, either " by joining the plaintiff in claiming what is sought " by the complaint, or by *uniting with the defendants* " *in resisting the claims of the plaintiff.*"

In resisting the claims of the plaintiffs below, the intervenor united with defendants in that Court, these plaintiffs in error. In the attack on the Miller location, defendants and intervenor made common cause. The question which, it appears in the Supreme Court's opinion was raised by the intervenor, was raised for the benefit of both and its decision was essential to a determination of the rights of both. These plaintiffs in error are certainly not estopped to present the question in this Court because they relied on its presentation by a party united with them in interest in the State Court.

In concluding this point, we submit that the following federal questions, arising on a construction of the United States Statutes, were necessarily involved in the determination of this cause, and were decided against these plaintiffs-in-error:

First. Whether or not a discovery of a seepage of oil is a discovery within the meaning of Sections 2320 and 2329 of the Revised Statutes, that "No location " of a mining claim shall be made until the discovery " of the vein or lode within the limits of the claim " located," and "Claims usually called 'placers' * *

"shall be subject to entry * * under like circum-
"stances and conditions * * as are provided for
"vein or lode claims;" or,

Second. Whether or not, upon failure to do the annual labor, required by Section 2324, the locator may abandon with intention of relocation, and after relocation be protected in the possession of his claim, under the provisions of Section 2322, that "The loca-
"tors of all mining locations * * so long as they
"comply with the laws of the United States * *
"shall have the exclusive right of possession and en-
"joyment;"

Third. Whether or not the Miller location was "made," or perfected, or whether or not it vested any right, title or interest in the locators, prior to the discovery of oil on the claim, under the provision of Section 2320, that "No location of a mining claim "shall be *made until discovery";*

Fourth. Whether or not the Miller location, when "made" or perfected by discovery, would give possessory title to more than twenty acres under the provisions of section 2331, that "No such location shall "include more than twenty acres for each individual "claimant."

II.

THE STATE COURT DID NOT DECIDE THE CASE ON OTHER GROUNDS THAN THOSE INVOLVING A FEDERAL QUESTION.

Counsel for defendants in error, in his endeavor to make it appear that there are grounds for the decision which do not involve a federal question, contends that the Miller association was in possession on January 1st, 1897, and that the entry of the Chrismans on such possession was clandestine and surreptitious, and that a valid location could not find its inception in such an entry.

The trial Court did not find as counsel asserts "that when they (the Chrismans) attempted to make "their locations, the land was *in the actual occu-* "*pancy and possession* of the defendants in error." It found, "that on the said first day of January, 1897, "no part of the said northeast quarter of Section 20 "was vacant, public mineral land or open to explora- "tion or location for mining purposes, but, on the con- "trary, the whole of said northeast quarter of said "Section 20 *was then in the possession of"* the Miller association, *"under and by virtue of their location* "of said land hereinbefore mentioned" (p. 25). But this is purely a conclusion of law, that *by virtue of their location they were in possession.* The evidence shows nothing further. It shows, as we have already pointed out, that on December 31st, 1896, Miller

posted the notice and marked the boundaries, and it also affirmatively shows that nothing further was done until the July following (pp. 42, 60).

There is absolutely not a particle of evidence showing *occupancy* by the Miller association on the first day of January, 1897, irrespective of the boundary markings; but, on the other hand, there is uncontradicted evidence that the Chrismans were constantly in actual occupation of and working the two claims from the time of their location, and from November, 1898, were living on them in a house which they had erected (pp. 62, 75, 82). If the location were valid, undoubtedly that association was in possession; if it were invalid, it had no possession. The finding of possession is necessarily premised on the validity of the location, and has no broader scope than such validity. There is no *pedis possessio* shown. While we admit that one may not surreptitiously or forcibly oust one in actual physical, though unauthorized, occupancy, in order to make location, the rule has no bearing on the instant case, for no such occupation is shown.

In *Funk* vs. *Sterrett* (59 Cal., 613), it is said: "The "Act of Congress in question provides (Sec. 2324, "R. S.) that, 'the location must be distinctly marked "'on the ground, so that its boundaries can be readily "'traced.' Since the passage of that Act, a party "can show a right to the possession of a mining "claim (when no patent has been issued) only by

"showing an actual *pedis possessio,* as against a "mere wrongdoer, or by showing a compliance with "the requisites of the Act of Congress. There is no "pretense of any actual possession of the whole claim "other than by compliance with the Act. The true "questions for decision, therefore, were: which party "had complied with the requirements of the law, and "was prior in time; not which, 'on the whole, had "'the better right.'"

See, also:

English vs. *Johnson,* 17 Cal., 108.

Nor is there any evidence or finding that the Chrisman entry was clandestine or surreptitious. It is true they posted their notice shortly after midnight, but not by reason of any malign or clandestine motive. They believed, and rightly as we contend, that the Barieau location would expire at midnight, December 31, 1896, and that the land would become open to location. Promtply after that hour they availed themselves of their rights, acting as soon as the law empowered them to locate.

Nor, even if the Court had decided this case upon the ground that the inception of the Chrisman location was in a surreptitious and clandestine entry on Miller's occupation, and that therefore they were invalid, could it have so decided without a prior determination of the last stated federal question, for

granting that the *pedis possessio* of one claiming mining ground embraces all the land within the marked boundaries, yet that rule applies only when the ground claimed is of such size as law or local custom allow to a claim (*English* vs. *Johnson, supra*). If by reason of the conveyance to Miller by his associated locators, the right to perfect location of more than twenty acres was lost, it follows that his *pedis possessio* could embrace no more than twenty acres.

What title these defendants in error possess and which they are endeavoring to quiet could be to twenty acres only, but such twenty acres could not conflict with the Chrisman locations. Those locations are the south halves of the two lower quarters of the quarter section (pp. 72, 80), while all the wells and works are above these locations (p. 95a). Under Section 2331 of the Revised Statutes such twenty acres would have to conform to the rectangular subdivisions of the United States land survey, consequently no twenty-acre claim upon which work was being done by the Home Oil Company could be below a line drawn east and west through the middle of the lower quarters of this quarter-section, which line is the north boundary of the Chrisman locations (pp. 95a and 98a).

In concluding our argument, we beg to submit, that on this motion the merits of the cause can not be inquired into or decided. We have endeavored to present to the Court the nature of the federal ques-

tions raised in the State Court and to show that they were decided there against these plaintiffs in error. The merits of those questions we have not touched on at this time. They are fully and exhaustively presented in our brief now on file, and their discussion at this time would serve only to confuse.

In the premises, it is most respectfully submitted that the motions to dismiss or affirm be denied.

JOSEPH C. CAMPBELL,
WILLIAM H. METSON,
Attorneys for Plaintiffs in Error.

FILE COPY

FILED
MAR 7 1905
JAMES H. McKENNEY,
Clerk.

APPENDIX TO BRIEF FOR PLAINTIFFS IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 171.

A. Y. CHRISMAN ET AL., PLAINTIFFS IN ERROR,

vs.

E. O. MILLER ET AL.

CERTIFIED COPY OF ARGUMENT OF MR. METSON ON BEHALF OF APPELLANTS IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

JOSEPH C. CAMPBELL,
WILLIAM H. METSON,
FRANK C. DREW,
Attorneys for Plaintiffs in Error.

PHILIP MANSFIELD,
Of Counsel.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 15053

(19,193.)

Copy.

IN BANC.

San Francisco, No. 2242.

IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA.

E. O. MILLER and THE HOME OIL COMPANY, a corporation,

Plaintiffs and Respondents,

vs.

A. Y. CHRISMAN and H. T. CHRISMAN,

Defendants and Appellants.

J. W. FEWEL,

Intervenor and Appellant.

Argument of Mr. Metson

ON BEHALF OF APPELLANTS.

REDDY, CAMPBELL & METSON,
AUSTIN & JONES,
W. R. McQUIDDY,
Attorneys for Defendants and Appellants.

Filed this.....day of March, 1903.

FRANK JORDAN, Clerk.

By..... .....Deputy Clerk.

(Endorsed.)

Filed March 3, 1903.

FRANK C. JORDAN, Clerk.
By J. C. CROOKS, Deputy.

IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA.

E. O. MILLER ET AL.,
Plaintiffs and Respondents,

vs.

A. Y. CHRISMAN ET AL.,
Defendants and Appellants.

} IN BANK

SAN FRANCISCO, CAL., Feb. 4, 1903.

ARGUMENT ON BEHALF OF APPELLANTS.

MR. METSON. In this case, may it please the court, there are two plaintiffs, Miller, and the Home Oil Company, lessees under the Miller title. The defendants are A. Y. Chrisman and H. T. Chrisman, father and son, each claiming a separate twenty acre tract out of a certain northeast quarter of section 20—160 acres. There was an intervention as to a certain other twenty acre tract of the 160 acre tract in behalf of one Fewel. Judgment went in the lower court in favor of the plaintiffs and against the defendants and against the intervenor, and the appellants here are the intervenor and the defendants. The complaint

was filed in the nature of a suit to quiet title, alleging that the defendants claimed the two twenty-acre tracts out of the 160, and at the time of the trial the intervention of Fewel was allowed.

MR. JUSTICE McFARLAND. Was this case ever decided in Department?

MR. METSON. No, your Honor, it was not decided. It was argued in Department and then sent to the court in bank. Now, with reference to the history of the 160 acre tract and the point in issue, the defendants claim that there was no valid location by Miller and his associates, they being eight in all, claiming 160 acres under the Mineral Land Act and the act of 1897 with reference to petroleum. Now, I take it that the case will resolve itself into a question of proper locations, and into the question as to whether a person can enter upon invalid locations and make a valid location; in other words, will there be a possession under an invalid location, no one being on the ground or in the neighborhood, and will it be good as against every one but the United States?

Sec. 355, Vol. 1, Snyder on Mines;

Gwellam v. Donellan, 115 U. S., 45.

MR. JUSTICE McFARLAND. Let me say one thing. I believe it is conceded by counsel on both sides that the location of oil claims is governed by the law as to the location of placer mining claims.

MR. METSON. We think that is correct, and I believe the other side agree with us on that proposition. Under the Act of 1897 of Congress that was put out of question. Now, as to the question of possession: As I understand it, in some of these oil cases that have been tried in the Federal courts the point was made with reference to certain parties attempting to scrip lands that had been theretofore located upon and then in the actual possession of people claiming under the Mineral Land Act, and the point was made that as to the mining locations, the parties being in possession under the alleged mining locations, although they had not made an actual discovery, the claim of those parties in possession was good as against the scrippers. And that turned upon a construction of the Forest Reserve Act. Under that Act of Congress it seems by deeding back to the United States patented land that you own within the forest reserves, you were given the right to file elsewhere upon *vacant* government land and upon an equal area thereof. And we will contend that these decisions turn upon the definition of "vacant government land," and have weight in a contest between mineral land claimants, both claiming under the Mineral Land Act. Now, section 2319 of the Revised Statutes of the United States reads as follows:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and

unsurveyed, are hereby declared to be free and open to exploration and purchase." In other words, the valuable mineral deposits belonging to the United States, or in lands belonging to the United States, are hereby declared to be free and open to exploration and purchase. The valuable mineral deposits are left free and open. There is nothing there about *vacant* land but in the Forest Reserve Act there is the word "vacant," meaning unfilled. It is true that the courts have ruled that you cannot enter upon lands in actual present physical possession—I mean actual occupancy, when a man is there with his feet or with a gun, and in range of that gun are boundaries he has marked upon the ground, that the courts have said, for the purpose of preventing bloodshed, and to have peaceable relations and avoiding a breach of the peace that you cannot enter. We contend that we may enter where there has been an invalid location, provided it is not then in the actual physical present occupancy of anyone, if a man is not there with his feet or armed force, that we may enter, and if we make a valid location upon the ground that he claims, and his claim being invalid, that the courts will sustain our entry.

We will contend at the time the entry was made by Mr. Miller upon this land, (December 31st) that the land had been theretofore located and claimed by other parties and was not vacant within the contention that will be made by the

other side, but that there was a valid existing location upon the date that he (Miller) made his claim.

The facts with reference to the Miller location are these: On the 29th day of December of the year 1896, Mr. Miller being at Visalia, wrote an abandonment of a previous location of the same 160 acres of land that is in litigation in this suit. He acknowledged that written abandonment on the 29th day of December of that year, and at 3 p. m. on the 31st day of December of the same year that abandonment was recorded in the county records of Fresno county, that being the county wherein this 160 acres is situated. Now, Mr. Miller claimed the right to make that abandonment upon this state of facts: It seems that in 1895 in June a man named Barieau and seven others filed and posted a notice of location upon this same 160 acres of land. Thereafter he went upon the land with a surveyor and they monumented the 160 acres of land, and Barieau testifies that he discovered oil, that oil was seeping from the ground in connection with water from a spring; that it was in the middle of the section of land, and we contend that made a complete and absolute segregation of vacant public land, the land theretofore having been vacant and unappropriated and that it was a complete location. Those facts are undenied. There is nothing in the case shading them. While the court has found that the

Barieau location was invalid and void, the court has found that it is invalid from no testimony whatsoever, because Barieau was not contradicted by any witness, nor was he contradicted by any circumstances. Now, we will cite your Honors to the case of Hayward v. Rogers, 62 Cal., 348 and 372; to the case of Evans v. George, 80 Ill., 51, 58; Jones v. The State, 48 Ga., 163; and we also cite Secs. 1844 and 1847; 2061, sub. 1, and 2103 of the Code of Civil Procedure, to the effect that where there is evidence that is undisputed, that the court cannot find adverse to that testimony, that the court cannot impeach the witness; that the presumption of innocence goes with the witness, and there are no circumstances here that would justify the court in making a finding of that kind, and we have attacked the finding. And furthermore, the court in other matters, in other particulars, and in other findings in this case, has set aside the undisputed evidence of other witnesses, and has found against the undisputed testimony, and we wish to cite the authorities just mentioned upon that proposition, that it is not within the province of the trial court to utterly disregard the testimony of a witness who is not impeached and where there is no testimony to the contrary. Mr. Miller testified that he was an attorney at law, and that he had been such for a great number of years. He says that he received deeds through a certain corporation called the Oil Producers Asso-

ciation for six of the titles of these eight men who made what we have and will call the Barieau location. In other words the title of seven of those men was joined in Miller by a quit claim deed on this 29th day of December, at the date he made this abandonment. The abandonment was recorded by Judge Harris in Fresno at 3 o'clock in the afternoon of the 31st of December. On the *forenoon* of that same 31st day of December, Mr. Miller went upon this very ground before the recording and made this re-location. Now, we will contend that that was a void re-location because of the Barieau location, and because the abandonment was not at that hour yet recorded. But, furthermore, there was one of that association—one of the eight—who had not signed the abandonment, and his title had not vested in Miller. He could not abandon or destroy the title of the man holding that eighth.

Therefore Miller only acted for seven, and he could not segregate the other eighth, it being an association location, and until the last minute of the last day of that year—of that calendar year—that title remained, and it was not possible for Mr. Miller to segregate one-eighth from the other eighths. He could advertise him out as provided by Congress but not otherwise. Furthermore, Mr. Miller's location either took effect from the time that he *acknowledged* that abandonment on the 29th of December, or the abandonment took effect from the *recording* thereof on the

31st day of December. If it took effect on the 29th then the testimony shows that Barieau went on the ground on the 30th day of December and for the second time for him put up a new notice of location, so there were intervening rights. Either it was not abandoned by Miller until the notice was recorded—the abandonment was recorded—or else it was abandoned when it was acknowledged and put in the mails. In either horn of the dilemma, let them take which they choose, Barieau on the 30th intervened, and his new notice would hold the ground for a reasonable length of time if his first location was void. On the other hand, if the abandonment took effect at 3 o'clock in the afternoon of the 31st, then the relocation of Miller was premature and void because made on the morning of the 31st of December. Now, your Honors have passed on that proposition in the case of McCann v. McMillan, 129 Cal., at page 352, and I am going to read to you from a new work on mines—Snyder on Mines—with reference to this case of McCann v. McMillan, which we think covers the right of Mr. Miller to abandon and immediately re-locate; and, furthermore, the record shows that Miller when he made this declaration of abandonment, when he wrote it and signed his name to it, having the right so to do for seven-eighths, testified that at the time he then and there prepared the notices of re-location for this same 160 acres and took them with him from Visalia to the ground

to be used, and they were used on the 31st day of December. I read from section 543 of Snyder on Mines, page 503 of Volume 1.

"As we have seen, forfeiture, or loss by abandonment, requires a union, or joint operation, of act and intent, and is generally a question of fact. But the mere fact of the owners in going upon a mining claim and announcing to each other that it is their intention to abandon it, and that they do thereby abandon, whereupon they immediately, without leaving the ground, attempt a re-location in the name of a third person, not present or taking any part, does not constitute an abandonment of the claim; and a re-location so made is invalid for the reason that the ground was not at that time open to re-location."

Snyder on Mines, Sec. 543, Vol. 1.

Snyder cites McCann v. McMillan, 129 Cal., as authority for the proposition. That is how your decision is construed by the text writers, and of course your Honors have in mind your own construction in the case of McCann v. McMillan. McCann and McMillan went upon a certain piece of ground which they had received a deed for from a prior location. They went there about the 27th or 28th day of December; they went over the ground and they testified, and it is uncontradicted, that looking at the ground there was mineral there, but it would require a heavy and expensive plant and they concluded, being poor men, that

they could not put up the necessary money and work to properly equip, plant and work the ground; they could not plant it, so it was useless for them and it would be ill-advised for them to do the assessment work as required by law. Thereupon they went off to another part of the claims, or other claims, and came back to this ground, and they said: "This looks very good," and thereupon one of them remembered that his friend Barkley in New York wanted some of this mineral ground—Barkley being a rich man—and they posted a notice for Barkley about the 29th or 30th of December, and this court held that was not an abandonment. This court held that the abandonment was made with the intent to defraud the United States Government out of one hundred dollars' worth of work, and it was not open to re-location upon the 30th day of December, because they could not abandon and relocate it for Barkley, and that is just what Miller tried to do. I say for those various reasons the ground was not open for Mr. Miller, even if it was open to other people. Miller came there and relocated something he did not intend to abandon. He only pretended to abandon, and was endeavoring to avoid the one hundred dollars' worth of annual labor, and we think this court will find that the Miller location was not a location made in good faith.

Furthermore, all that Miller did on the 31st day of December was to go there and post a

notice, and he did testify he monumented the claims, although that was contradicted, that he did put up monuments at each corner of the 160 acre tract on that day, and the court so found, and inasmuch as there was a conflict in the testimony, we cannot dispute but that the ground was monumented and that the notice was posted and recorded on December 31st, 1896, as prescribed by the State statute at that time. After putting up this notice and the monuments on December 31st, Miller returned to Visalia leaving no one in charge and did not return for months. Now then, it is an undisputed fact that Mr. Miller did not make a discovery at that time nor prior thereto, and that he did not know that the ground contained mineral. Thereafter, and on the first day of the following January (1897) the Chrisman locations were made. Now, it is undisputed that in July of the following year of 1897, Miller became possessed by quit-claim deed of the rights of the other seven of this association of eight people who made the Miller re-location December 31st, 1896.

MR. CORY. Grant deed, not quit-claim.

MR. METSON. Made bargain and sale deed in form, we will say, the fee being in the United States of this seven-eighths of the 160 acre tract. That brings us up to another proposition. If your Honors will bear it in mind, that was in July, and still no discovery. Miller said he did not know of any mineral upon that ground; there

were to him no indications of mineral. In September Miller made a lease to one Barrett, and in December the sub-lease (of Barrett)—the Home Oil Company—did discover oil. The uncontradicted evidence is that from the 31st day of December, 1896, all through the year of 1897, there was no discovery of oil, no discovery of mineral as to or under the Miller re-location, until December. Now, that brings the court to this proposition: Can eight men associate themselves together for the purpose of segregating a portion of the public domain therefrom, or take 160 acres, the maximum limit allowed by the United States laws, and having gotten their association together, go out and put monuments upon a piece of ground, and post a notice upon that ground, and there be no discovery of minerals and acquire any rights?

I want to read to your Honors to refresh your minds upon that proposition from Section 2320 of the Revised Statutes of the United States: "Mining claims upon veins or lodes of quartz or other rock in place bearing gold, * * * or other valuable deposits, heretofore located, shall be governed * * * A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal * * * * * but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Now, eight men at-

tempt to locate a vein of quartz; they think they know where a vein of quartz exists, but they make no investigation demonstrating or proving what there is. They go there and segregate it by building a fence around it. They carve out 1500 feet by 600 feet. They may build a stone wall around it but can they get by that provision of the statute, "But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located?" Now then, before any discovery is made seven of those men under a placer location convey to the other one of the eight, and the same provision applies to placers as to lodes that there must be a discovery of the mineral. We have Miller in December, 1897, claiming *160* acres of land when the statute says, 2331, he can only claim *twenty*. Gird v. Cal. Oil Co., 60 Fed. 541. I think that is what it resolves itself to, and that is the question that your Honors have got to decide in this case. Section 2331 of the Revised Statutes reads: "Where placer claims are upon unsurveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after the 10th day of May, 1872, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer

claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands." The preceding section is: "But no location of a placer claim made after the 9th day of July, 1870, shall exceed 160 acres for any one person or association of persons, which location shall conform to the United States surveys, etc." Now, we understand that that has been construed to mean just what it says, by the Land Office. The foregoing provisions of law are construed to mean after the 9th day of July, 1870, no location of a placer claim can be made to exceed 160 acres, whatever may be the number associated together, and no individual can take more than 20 acres. Now, Miller in December, '97, first acquired the right to locate that ground, because a right can be acquired only by discovery, and admittedly no discovery was made by or under him until December of 1897. Now that is the situation. I cannot find any cases upon it, but it seems to me, reasoning from the statute, where the statute says discovery is the inception of a man's rights, and reading the statute which says that 160 acres can be taken by eight, and that twenty acres can be taken by one, that Miller and his seven associates were but as one in December, '97, because they had all conveyed to him before discovery and that he is claiming and trying to support a 160 acre location under a discovery made by one man—under a location made by one man. And we claim

that in this case that the location of 160 acres Dec. 31, '96, by Miller is absolutely void. He would be entitled to claim only one twenty acre tract but which one of the eight 20-acre tracts? How is the court going to lay out that one twenty acre tract? Is it going to take the well as an axis?

MR. JUSTICE McFARLAND. You mean 20 acres of land. You don't mean 120?

MR. METSON. Yes sir, 20. Is he going to take that well as the hub and swing around the circle like the spokes of a wheel?

MR. JUSTICE McFARLAND. If the location is made before discovery, but discovery is made before the rights of any other parties intervene, you claim still the location is void?

MR. METSON. No sir.

MR. JUSTICE HENSHAW. Dates from the time of the discovery.

MR. METSON. It would. All the preceding acts, monumenting and posting notice would be drawn down to the discovery. That is the date that it is segregated from the public domain. That is the location.

MR. JUSTICE McFARLAND. Your proposition is this, that the conveyance of these other seven to Miller before discovery was made amounted to nothing, they had nothing to convey?

MR. METSON. That is our proposition; yes sir. They had nothing they could convey, and if

they did have the right to convey, that the association then terminated by the conveyance. That was the division of the partnership; that was an accounting; that thereafter it was one individual, and he could only claim twenty acres by a proper location, and having attempted to locate 160 acres the whole thing would be void, because the court could not segregate one twenty from another.

MR. JUSTICE HENSHAW. If the location of the eight had been valid and seven conveyed, of course Miller then would hold seven-eighths out of the 160 acres.

MR. METSON. He would have held the whole location.

MR. JUSTICE HENSHAW. Seven-eighths.

MR. METSON. In the second Miller location he (Miller) was one of the eight. In the first (Barrieau) location Miller only had seven-eighths he could control.

MR. JUSTICE HENSHAW. Having abandoned that location, if his abandonment amounted to anything, then when he re-located he could only re-locate for twenty acres. That is your proposition?

MR. METSON. Yes sir, in the way this was done or rather attempted to be done. Under the Barieau location made in 1895 there are eight men. That was a valid location. When completed they had a right to convey. We contend that was a valid location and they had a right

to convey. But in discussing this question of abandonment and the discovery in Dec. '97 we want to keep in mind that there were two association locations attempted one by Barrieau and one by Miller.

MR. JUSTICE McFARLAND. You first claim this location of Miller was void?

MR. METSON. Yes sir.

MR. JUSTICE McFARLAND. Passing that. Suppose Miller's and the other seven was a good location, provided mineral had been discovered then you claim that notwithstanding it being good, if discovery had been made before a conveyance, yet as the discovery was not made before the conveyance, that the conveyance of the other seven conveyed nothing?

MR. METSON. Yes sir, and that when the discovery was made it only entitled him to twenty acres. Then he could have made a re-location of twenty acres, but could not revert a year back to the 31st day of December, '96, and claim 160. Then he as an individual would have to remonument and stake out his 20 acres. I think we admit there can be no valid location, unless the boundaries are distinctly marked upon the ground. That has been agreed to in the briefs of both parties, and there can be no valid location without discovery. I want to read, to refresh your minds, a citation from Erhardt *v.* Boaro, 113 U. S. 537, where it says: "A mere posting of a notice on a ridge of rocks cropping out of

the earth, or on other ground, that the poster has located thereon a mining claim, without any discovery or knowledge on his part of the existence of metal there, or in its immediate vicinity, would be justly treated as a mere speculative proceeding, and would not of itself initiate any right." I contend that all that was done here was the posting of a notice and marking of the ground, without a discovery, on the 31st day of December, 1896. But "there must be something beyond a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground, such as the discovery of the presence of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence." Now then I want to suggest to your Honors that the testimony further shows that the Miller location made by him on December 31st, 1897, by the posting of a notice, with the names of eight people on it, was in effect a dummy proposition.

MR. HARRIS. December, 1896.

MR. METSON. Yes, December, 1896, is correct. Eight names, and only two or three *bona fide* locators. The record shows that, and, therefore, the Miller location was void.

MR. CORY. The finding of the court is against you on that.

MR. METSON. Yes sir, and I say there was no dispute in the testimony upon these various propositions, and I cite your Honors to Section

450, Vol. 1 of Lindley upon the question of dummy locators.

On the first day of January of the year 1897, the defendants Chrismans went upon the claim. They went upon the lower part of this 160 acres in dispute. It is undisputed that they put up monuments and posted notices, and the court finds that they did. They claim twenty acres each. They both testified and other witnesses testified that they discovered oil at that time, that they found oil there before, knew it was there and they go on and state they at that time did certain work, and thereafter that they did certain work. The court finds there were no discoveries of oil, and the court finds upon this sort of testimony that two or three years after this location was made by Chrisman that certain people went there and examined the ground, examined the excavations there and that they did not at the time of examination find indications of oil. I submit that that is an unjust finding. In other words there was some negative testimony by these men who said they did not years after see oil. They went there after the surface of the ground had been disturbed, where the oil had been. These same men testified on the trial that when oil reaches the air it disintegrates. (Trans. f. 521, p. 174.) It passes off by being disintegrated by water, and it makes certain rainbow colors upon water, and these witnesses testified there were springs upon

this land and oil came out with the water from the spring and that there was oil there on the first day of January, 1897, the date when Chrismans made these various locations. Our contention is, and the record shows it, that all surrounding this 160 acres, and within the 160 acres of land in dispute, and prior to the time this examination was made, that there numerous oil wells had been opened. It is demonstrated that these various oil wells and openings relieved the pressure upon the oil and gas in the earth, and that naturally the oil would not exude as it had through the springs at the time the Chrismans made their locations, and they testified positively to the discovery of the oil. They testified positively to bottling the oil and taking the oil away from there, and other witnesses testified to that. And we will contend and do contend to this court that there was an actual discovery, and as an evidentiary standpoint there is no conflict here in the evidence, and that the finding of the court was wrong.

Irrespective of whether we have a good title or a bad title, if our title be weak, they have got to recover upon the strength of their own title in this case, and if we destroy their location, if we make any one of these propositions successfully to this court, then the case should be reversed. We think that is about all that we want to say upon the opening, except that we have been written to on behalf of the intervenor in this case. Their

case is fully set up in their briefs. They asked us to state to the court that their proposition was based on facts like these; that they contended that Miller had no right to abandon the first Barieau location made in 1895 because there were but seven-eighths vested in him. They contend Miller's location of Dec. 31st, '96, was made by dummies, and Miller had located the ground as school land; attempted to buy it as school land, and had a homestead application filed on it, and he was determined to get that ground in some way, and he did not intend to abandon in good faith; that the Miller location never was attempted to be made in good faith, and that no discovery of oil was made until December, '97; and then it seems after December the intervenors in this case—the other parties (Millers not having taken advantage of the discovery made, base their location on the two 20 acre tracts; that they intervene for—or forty acres—they made their (intervenors') discovery upon oil exuding from the well sunk by Miller or Miller's lessees, and located before Miller or his lessees did. They contend that inasmuch as Miller never made a valid location of the 160 acres, inasmuch as the conveyance from his seven partners to him was made in July and discovered oil afterwards, that they had as much right to claim the discovery of oil made by the well bored by Miller or his lessees as the other parties, having waited a reasonable time for Miller or his lessees to re-

locate under the oil discovered flowing from this well. That is the situation as I understand it. I also want to cite to your Honors Mr. Lindley on the question, and some other cases. I want to call your Honors' attention to Sections 218 and 219 of Lindley, Vol. 1, upon the proposition that we had the right to enter within Miller's monuments granting that he made it on the 31st day of December, '96, and had a right to locate on the first day of January. That is one of the points, and we want to contend this, that the courts of the western slope have been dealing with words of children, that they have been taking up the time of litigants, that lawyers have been stealing the money that they received as fees if the argument be made to the court and sustained that a man can go upon a piece of ground and put up a notice and can hold that ground forever until the United States intervenes,—we claim that the decisions of this court are undisputed that if a man goes upon and makes a location or attempted location, if he monuments a piece of ground without discovery, and any reasonable length of time having elapsed, and he not being in actual possession, that then I have the right to go there and relocate the ground having made a discovery. In fact I have a right to prospect the same ground as long as I can do it peaceably, and if I make discovery first that that is the initiation of rights. For instance this court in the 66th Pacific Reporter in this

case of Tuolumne Consolidated Mining Co. v. Maier held this: There was a mineral location we will say in 1896, by the posting of notice and monumenting a claim—quartz lode; no discovery admittedly; and the court held that there was no discovery. Now a man builds a ditch across that claim, subsequent to monumenting of it, but prior to discovery. After discovery is made the owner of the claim brings ejectment against the owner of this ditch, and the court holds that it was government land; that it was open to everybody until the discovery was made. Is it to be now demonstrated that courts have been dealing and using the words—"intervening rights"—and dealing with subsequent locators and their rights ill-advisedly. It is startling to me. It is startling how the western courts, State and Federal, have been passing upon these matters right straight along since the act of 1872 down to the present time, and that we are now to discover that until the United States intervenes that no man can question a notice posted upon the ground. If they can't question the notice that is posted upon the ground they cannot question the size of the claim. The decision in Cosmopolitan v. Foot (?) 101 Federal p. 518 where the court carved 900 feet off the claim because the lode ran across the claim instead of running lengthwise, and other decisions where claims that were over 1500 feet in length were cut down so as to make it conform to the

statute, might just as well be looked upon as babbling. One might just as well post a notice and take the site of Oakland as one end of a mining claim and put the other one as the other monument at San Diego, and claim everything intervening, and wait until the United States interferes. See Sec. 218, 219 Lindley, Belk v. Meagher, 104 U. S. 284, Burns v. Clark, 66 Pac. R. p. 12.

MR. JUSTICE McFARLAND. You appear for the intervenor too?

MR. METSON. No. I just make this statement at their request.

MR. JUSTICE McFARLAND. It does not seem to me the intervenor had any right. He went right on the claim after the other man had developed it and sunk a shaft, and the first man that ever showed there was any oil there, he goes there and locates their works and everything else.

MR. CORY. Does it in the night time also.

MR. METSON. The testimony shows he posted the notice in the night time and monumented it in the day time, and was then run off with a gun. But the point they make is this, that the other people, if they made a discovery, that they could have located within a reasonable time by doing the other acts necessary to complete a valid location. That is their point, and inasmuch as they did not do it, the intervenor had the right to locate. But their briefs are

full. There are a great many other points in the case that I do not want this court to understand we waive in this matter, for they are fully argued in the briefs.

CLOSING ARGUMENT.

MR. METSON. May it please the Court, I want to read here Mr. Canfield's testimony, the Home Oil Company's manager and president: "There have been improvements on these two 20 acre tracts; there is some road built, a derrick there, two houses built and some other buildings placed on the same. I don't know, but suppose Mr. Chrisman put them there." (Folio 332, tr. p. 111.) Chrisman testified he put up buildings, sunk shafts, run tunnels there, and a number of other witnesses saw the excavations made by the Chrismans. Mr. Canfield testifies there was no work done there since Barrett did some work in 1896 upon that claim except that done by the Home Oil Company, and the Home Oil Company did the work under a lease, and the lease was in September, 1897. (See p. 110, tr. folio 328.) Miller testifies: "In the year 1897 there was considerable work done upon this quarter section, and among other things there was an oil well completed during that year. I think the work commenced sometime in the summer of 1897. There were also some roads built, a derrick erected, oil well casing purchased, a well drilled about 700 feet deep and completed,

which yielded and flowed oil during that year. The value of the work done in 1897 was from $3000 to $6000. All of this work was done by the Home Oil Company as my lessees." (P. 75 tr., folio 225.) The lease was made September 17, 1897, (folio 227, p. 76). The point is made that there is no testimony in this record as to when oil was discovered and there is the testimony of Mr. Miller. I read from page 75. That does not give the date but the lease does. It says the work was done by the Home Oil Company, and Mr. Canfield swears no work was done except by Mr. Barrett in 1896, and it is surprising to me to think that when we attack a finding upon the ground that the evidence does not support it, that because there is no evidence, therefore, the finding must stand. The finding stands because it is their evidence or *no evidence*. That is new law to me. In other words, if discovery under the statute is the inception of location and must exist, because plaintiffs do not show it in the evidence and a judgment is for the plaintiff, therefore the judgment must be supported in this court—that is a novel proposition. Now then, I want to read to your Honors hurriedly from page 122, from the testimony of Mr. Barieau. They said there was no discovery to support the Barieau location. "I saw some indications of oil on this northeast quarter in 1895," etc. "It floats on the water there" (Reading). I admit that locations of oil does not control, any more

than indications of gold. I say oil is oil, however. Barieau says he actually saw the oil. I say, furthermore, and invoking the doctrine of this court in Conway v. Hart in 129 Cal.,—this court in that case supported the judgment that was obtained by plaintiff in the lower court simply because some of the witnesses testified as to a ledge, not a mineral bearing ledge; said there was a ledge at certain points, and because there was a shaft which was bisected by two locations, part of the shaft being cut by the end line of one location and part of the shaft cut by the end line of another location, still the court, speaking through Judge McFarland, says that the question of mineral could have been put out of dispute by asking any witness the direct question, and overruled the defendant's protest because of the fact that the dump from that shaft contained gold rock and therefore supported the location; concluding from that, because there was gold taken from the ledge in the shaft, although that shaft was bisected by two claims, and a ledge running from there on, that therefore the ledge would carry gold, although there was no direct proof as to which location this gold came from. We think the court ought to be consistent, and we think that if there is some mineral or some metal such as will lead the proprietor on to further exploration to a further investment of time, labor or money, that that is a sufficient discovery. (Book v. Judice, 58 Fed., 106).

I think personally there has been too much legislation by courts with reference to the statutes of Congress, and I do not ask the court to legislate in the matter, but we simply claim that oil is oil, and not an indication. Now, Barieau says this is in 1895. He says: "Was close to the east line, close to the southeast corner. The place where I saw the indications of oil is about ten chains north from the southeast corner, and about five or ten feet inside the section line; it comes out with the water, floats on the water. There is a permanent spring there, especially in the summer when it is hot. The oil runs there in the summer. I know the location because I surveyed it, run the line. There is a spring there and the oil comes out and floats on the water in the summer time when it is hot. In June, 1895, there was a little water with oil and a little oil with the water coming out. It was dripping over a rock about two feet high. There was no pool, it was dripping, just dripping a little water and oil; not much water. It was a narrow gulch." He says there was oil. I say that oil is more than an indication of oil. This bears the relation that gravel in a stream carrying gold is moved along that stream in time of freshet. That gold in the moving gravel if found would be the inception of a placer mining location; and so it would be here. This man found oil, and that is what he was looking for, and I maintain under the decisions of this court shall sustain it

as a proper discovery. There was no conflict about that. After these excavations were made by Chrisman, after they had sunk shafts and ran cuts and made tunnels, and two years after the location, after the discovery is claimed by them this ground was examined by experts—and the court knows what experts are. After the ground had been opened up by various wells and oil had been pumped, after the pressure from beneath had been relieved, after the surface oil had been covered or disintegrated by the elements, I say that it is not sufficient to raise a conflict because one man swears positively he saw a thing; takes oil in a bottle and carries it off; has it tested and determined to be oil; because another man comes there two or three years afterwards and he does not find oil that he can see, that that is not sufficient to invalidate the location. The 65 Pacific Reporter, 875 cited by counsel is a case I have not read, but that is in direct conflict with McCann v. McMillan, 129 California, and Tuolumme Con. M. Co. v. Maier, 66 Pac. Rep. 863-864. In McCann v. McMillan the McMillan location was held invalid because of the showing that the ground was not vacant public land re-located for Barclay. Why? Because this court held that Calm and McMillan could not abandon the location theretofore existing and McCann did not seek to connect himself with the source of title—McCann did not seek to connect himself

with the prior location, but McCann showed the prior location and showed that the abandonment was void, and that was the reason McMillan lost in that case, (Gwellam v. Donellan, 115 U. S, at p. 50, last half page. Sec. 354 Vol. 1, Snyder on Mines.)

I submit all of the authorities mean that until the last minute of the last day of the year there having been a valid location theretofore that the ground has been segregated from the public domain, and remains until time for doing annual labor has expired. In other words, it is not government land; the mineral deposited therein is not subject to exploration and the land to occupation and purchase, and in order to support a location they have got to show it was not held under a valid location not forfeited for want of assessment work.

Lockhart v. Johnson, 21 Sup. Ct. Rep., p. 669–670.

Fisher v. Seymour, 49 Pac. 30–33, 5th P. Syllabus.

As to citizenship, I submit the citizenship question has been determined. It has been determined by the Supreme Court of the United States. It has already been demonstrated in this work that only public mineral lands of the United States are open to location and purchase under the laws of Congress and the state laws in subordination thereto.

Snyder on Mines, Sec. 279, Vol. 1, p. 243.

It must be quite apparent that where the land,

even though otherwise public mineral land, is covered by a valid subsisting location it is not open to exploration and purchase and therefore no valid discovery or location can be made upon it; *a fortiori* that the settled rule is that a location to be made must be good when made.

Sec. 156, p. 130, Vol. 1, Snyder on Mines.
Citing Omar v. Soper, 11 Colo., 389;
Belk v. Meagher, 104 U. S., 279, and California cases.

It has been determined by the United States Circuit Court of Appeals. I admit that question has been one that has been decided differently in a great many courts, but I submit that the Melsing case in the United States Circuit Court of Appeals decided that.

THE CHIEF JUSTICE. Has that question ever been decided in the Supreme Court of the United States?

MR. METSON. Yes sir. Manuel v. Wolf, 152 United States Reports, and followed in Tornanses v. Melsing. Finally by McKinley v. Alaska, 183 U. S., 563. I submit the citizenship question is out of this case. Furthermore, it can only be questioned by the Government in cases involving a patent application. If this was a patent contest then a man would have to show he was a citizen; to be a good patent must show he is a citizen, and it has been held, if he declares his intention just before the trial, or during the trial, that it is sufficient.

Now I want to say, furthermore, with reference to the Barieau location—I mean the first Barieau location of 1895, that the doctrine is whatever is done for a man's benefit is presumed to have been ratified or authorized, and I cite Lindley on that—agency exists—Section 331, Vol. 1 of Lindley, and that citizenship is presumed. Furthermore, the authorities agree upon that proposition. I submit that under the Del Monte Mining Co. v. Last Chance Mining Co., 171 U. S., we have the right to enter upon patented ground as long as we do it peaceably, so long as we do it without fraud and without force, we have the right to enter upon the patented location of another man for the purpose of putting posts there and monuments there and making our end lines parallel, and I think that is the last decision upon the subject. Again I quote from Judge Ross in the Nevada Sierra Oil Co. v. Home Oil Co. in 98 Federal Reporter, 673: "It is true that upon mineral lands of the United States upon which there is no valid existing location any competent locator may enter, even if it is in the actual possession of another, provided he can do so peaceably and in good faith, in order to initiate a location for himself."

There have been many briefs filed in this case. Several gentlemen appear here as friends of the court and they have filed many pages. They don't want certain questions decided. Why?

We submit that the plaintiff has got to make

out a case. We have attacked the plaintiff's case in every point that we deem vulnerable. That counsel do not rely upon the abandonment of the first Barieau location I never heard of before. They rely upon it in their briefs. They did not until today so express themselves, but if they do not, Barieau upon the 30th of December, '96, one day before Miller went there, posted a new notice, or re-location of this same ground, therefore he (Barieau) was ahead of Miller, and the ground was not open for re-location by Miller on the 31st. Barieau posted that location on the 30th day of December. If the abandonment proposition is not supported, if they do not stand upon that it is in the record that Barieau posted a notice there on the 30th day of December, '96. A copy of the notice is in the transcript and it was put on record. He recorded it, as in Newbill v. Thurston, and he had a reasonable time within which to examine his claim and the ground was not open to re-location by Mr. Miller. Furthermore, grant this is valuable ground and ground that the Home Oil Company did expend money there, I submit the testimony shows they have been extracting this oil. They have been getting a revenue therefrom. I submit they were well advised as far as the law gives recognition of the defendants' rights so far as there was anything incumbent upon defendants to do it was done by monumenting those claims on the first day of January, '97, the next day after the Miller loca-

tion. It was done by posting notices and recording them. Our people went into and were in the actual possession; they were making excavations there; they built houses there, and if the Home Oil Company—if diamonds and diamonds a mile deep were there it cannot be urged against us. We may be poor men and unable to put up a plant such as rich men could. That should not be raised in oral argument, and should not be put in the briefs as it has been. We have acted in good faith. We understand counsel on the other side have. We claim the equities are equal; that is, we claimed something that we thought we were entitled to, and we believe that whether the ground is rich or poor or when they after that placed a plant there according to their means, or whether these defendants have a plant in accordance with their means, that we should get equal justice from this court, and we know we will.

IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA.

S. F. No. 2242.

MILLER,
Respondent,

vs.

CHRISMAN ET AL.,
Appellants.

ON APPEAL FROM THE SUPERIOR COURT OF THE COUNTY OF FRESNO.

I, Frank C. Jordan, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an argument filed March 3, 1903, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the court, this 15th day of February, A. D. 1905.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk*,
By OSCAR A. TOLLE, *Deputy*.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 171.

A. Y. CHRISMAN ET AL., PLAINTIFFS IN ERROR,

v.

E. O. MILLER ET AL., DEFENDANTS IN ERROR.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

JOSEPH C. CAMPBELL,
WILLIAM H. METSON,
Attorneys for Plaintiffs in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 15169

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FEDERAL QUESTION.

We beg leave to call the attention of the court to the case of Matthews *vs.* Zane, 4 Cranch, 654 (2 Law. Ed., p. 381), upon the proposition made by defendants in error that no Federal question appears. We cite Matthews *v.* Zane because it seems to be exactly in point, and it is not cited in our brief in reply to our opponents' motion to dismiss or affirm.

We wish to add the cases of—

Columbia W. Co. *v.* Columbia E. Co., 172 U. S., 521;
Murray *v.* Charleston, 6 Otto, 432;
Wolf *v.* Stix, 6 Otto, 541;
Murdoch *v.* City of Memphis, 20 Wall., 591;
Sayers *v.* Denny, 158 U. S., 180;
Belden *v.* Chase, 150 U. S., 691;
Stanley *v.* Schwalby, 162 U. S., 255,
And Garland and Ralston's Federal Practice, secs. 314, 315, 316, 317, and 324,

upon the point that if a Federal question appear by clear and necessary intendment it is sufficient.

Furthermore, the statement of the supreme court of California in its decision that all parties claim by virtue of locations made under the mineral laws of the United States (Record, p. 121), and the opinion of the Chief Justice of California (p. 127, bottom, and p. 128, top, Record) and the findings upon the question of discovery by Barieu and the plaintiffs in error at pages 122 and 124 of the record. These findings, together with those by the trial court, present nearly all of the questions which are raised by defendants in error, and show conclusively that their assertion that the case went off on some other point than Federal question is incorrect.

Therefore we contend, upon the foregoing and upon the authorities in our other brief upon the motion to dismiss or affirm, that nothing was decided by the State courts except that which necessarily was and is a Federal question.

What are the Uncontradicted Facts?

Miller wanted to get or control all the 40 acres of land sought by plaintiffs in error, but *also* the adjoining 440 acres. December 29, 1896, Miller prepared notices for the whole 480 acres (Record, p. 42, bottom of page).

Miller was willing to get the land any way, even by filings on existing oil wells, as Miller was the attorney for L. E. Hall (brother of W. F. Hall, who was with Miller the day of location, December 31, 1896), who filed August 26, 1896, a homestead on the northwest quarter of said section 20—homesteaded mineral land (Record, p. 44, bottom of page), and to quitclaim this homestead Miller was to get the rest of the section (Record, p. 45, top of page), and on December 15, 1896, just 14 days before his attempted location, Miller tried to get the half section as California State school land (Record, p. 45, bottom of page).

Miller also prepared the application of Smith to the State of California for the northeast quarter of section 20 (Record, top of p. 46), and, as counsel for defendants in error is eternally introducing alleged equities in his briefs, we want to further suggest that Miller never did a tap of work upon any of this ground himself, and that his conduct is in strange contrast with that of the Chrismans so far as effort, means, and endeavor go. That the Miller companies allied together should first get into the pay was fortune, and for all they put in they were getting out, but the Chrismans got nothing out.

Why not say they want the land, as we do, and stop talking about their outlays. The Standard Oil lays out great sums, but the income is proportionate.

Miller, as it appears from his own testimony, went from his office and home in Visalia on December 29, 1896, about one hundred miles, to Coalinga and Oil City (Record, p. 50, folio 91; Record, p. 42, folio 77). On December 31, 1896, from Oil City upon the land in controversy, to put up monuments and a notice of location; which done, Miller went off the land "and went back over to the cabin at Oil City, "where I had stayed the night before" (Record, p. 40, folio 72; Record, p. 41, folio 74), and then returned to Visalia (Record, p. 58, folio 105, Hall); and Miller testified that he was back over the land ten or fifteen times afterwards (Record, p. 43, near top of page).

Miller never did any work on the property and none was done until after September under his alleged title (Record, p. 42, top of page).

The defendant in error, Home Oil Company, leased from Miller in September, 1897. C. A. Canfield, manager for Home Oil Company, testifying for it, said no work had ever been done by it upon the ground claimed by plaintiffs in error (the Chrismans), but that the Chrismans had built some road, a derrick, two houses, and some other buildings on the ground claimed by them (Record, p. 62, folio 111),

and it appeared that a tunnel fifteen or twenty feet deep (p. 69, Record, Fearon; p. 75, Record, folio 135, Chrisman) and did the assessment work thereon for the years 1898 and 1899 (Record, p. 82, folios 148–9), and the affidavits of assessment work thereon appear at page 86 of the record and are *prima facie* evidence, and that it appears we went peaceably and quietly upon the ground, and the *nisi prius* court so declared in its so-called findings (Record, p. 24, subdivisions XII and XIII), and discovered oil, as stated in findings of the supreme court, of all of which there is positively no one word of contradiction.

Counsel for defendants in error seeks to foreclose our rights by a mistaken assumption of facts at page 68 of his brief, and following that misapplies authorities to incorrect facts.

Findings of Fact Conclusive, When?

We do not concede that findings of fact are conclusive upon this or any other appellate court unless they be findings of ultimate facts within the issue tendered by the complaint and there be evidence to support them or admissions made supplying the place of evidence.

This court certainly cannot be bound by what purport to be findings if made in the face of all the testimony or of admissions or stipulations of the parties or upon merely evidentiary propositions arrived at by applying a mistaken view of the law and being practically conclusions of law. We think the elementary rule deduced from all the authorities is that findings upon ultimate facts within the issue where there is substantial evidence, admissions, or stipulations to support the finding are conclusive, but not otherwise.

An appellate court will not reverse a lower court upon a conflict of evidence, even though the appellate court might view the evidence differently, and even though it would have decided differently had it acted in the place of the trial court.

But this court would certainly foreclose itself of all right of review if it should accept as conclusive so-called findings having no evidence to support them, or against stipulations or admissions of the parties made at or prior to the trial or against all of the evidence. That would be sacrificing substance to shadow.

Unless a so-called finding is based upon a presumption, evidence, admission, or default and within the issue, it is not a finding of fact, and therefore not the subject of consideration.

It is of no substance or effect.

Undoubtedly it is not a "finding of fact," but a *question of law.*

We understand the Supreme Court of the United States will look into the case and see what is the real substance and effect of the decision. It cannot be deprived of its right to review by accident, fraud, or mistake. It will look for itself. In McCullough *v.* Virginia (172 U. S., p. 116, bottom, and p. 117, top) it is said:

"It has been repeatedly held by this court that in reviewing the judgment of the courts of a State we are not limited to a mere consideration of the language used in the opinion, but may examine and determine what is the real substance and effect of the decision. * * * In other words, can it be that the mere language in which the State court phrases its opinion takes from or adds to the jurisdiction of this court to review its judgment? Such a construction would always place it in the power of a State court to determine our jurisdiction."

Also cases cited in the opinion at pp. 118–119.

In the present case counsel for the defendant in error seeks to conclude us by certain so-called findings of fact made by the trial court, and asks this court to assume that they are findings, when in truth and in fact most of them are but conclusions of law. Inadvertently, no doubt, in making his statement of said so-called findings at pages 3 to 7 of the

brief of defendants in error, certain pertinent phrases and clauses are omitted by counsel which materially alter the complexion of these so-called findings and make some of them in reality conclusions of law.

For instance, in speaking of the ninth so-called finding of fact (Record, p. 23) he omits the words "under and by virtue of the terms of said lease," and from the eighteenth (p. 26) "been in the exclusive possession." The omission of these words makes quite a difference as to possession. A paper possession is quite distinct from a physical occupancy. A *physical occupancy* is the basis of counsel's argument, and the authorities in support thereof are, *pedis possessio* cases. The substance of the decision of the *nisi prius* court is a paper possession and not an actual being on the land; therefore the elimination of the words stated might change that put as a conclusion to a fact and place a different aspect on the statement.

Again, the so-called finding number three has been changed in the statement of facts by omitting "under the title of the plaintiff" (Miller), and the ownership and title of the plaintiff (below) is shown by other of the so-called findings to be a paper one and not physical possession except as to part.

To illustrate: In so-called finding eight (Record, p. 23) it is stated that Miller and seven others did *make a mineral location by* posting a notice and *by* marking said location on the ground, and (finding XVII, Record, p. 25) that *thereby* it was then in the possession of Miller and seven others under and by virtue of their said location, and said land was not because thereof vacant or open to exploration. This is the plain reading of the so-called findings, because (in findings XIII and XIV, Record, p. 24) it is stated that the plaintiffs in error (Chrismans) on January 1, 1897, did enter upon a portion of said land, post a notice that he claimed the same for mining purposes, and did mark the said land, and (in finding XVII, Record, p. 25) it is impliedly stated

that work and labor was done by the Chrismans (plaintiffs in error) upon their claims.

The testimony shows that it was testified to by our opponents and is uncontradicted as to the work done, the excavations made and the houses built, and the actual living thereon by Chrismans, and no possession of any part of the Chrismans' (plaintiffs in error) claims by defendants in error. (See testimony of Canfield, manager for one of the defendants in error, at page 62 of the record.)

But counsel for our opponents wants to conclude from the so-called findings that possession, as a matter of law, exists when a notice is posted upon mineral land, claiming it as a mining location, and by monumenting the land claimed so that its boundaries can be readily traced. This, we urge, is in conflict with section 2320, Revised Statutes of the United States, which says no location shall be made until the discovery.

The so-called findings show we entered peaceably on January 1, 1897, and that we did work, and under section 2319, Revised Statutes of the United States, the lands of the United States are *free* and *open* to *exploration* until discovery, and we initiated our exploration at least, and therefore; under these very findings, we have the privilege there to remain until discovery and a proper marking, and no one man can claim more than 20 acres in one placer location, and the word *location* includes discovery and marking. In the case at bar Miller and seven associates marked out a piece of land, then the seven associates dropped out—conveyed to Miller—*then* Miller made discovery through his lessee. We say he could then have 20 acres only of *vacant* land, not 160 acres. He did not *mark* a 20-acre tract and how can the California court declare invalid sections 2319, 2320, and 2331; Revised Statutes of the United States, and adjudge in favor of Miller as owner and against Chrismans, even if the latter were only poor prospectors laboring for a "discovery."

At the very worst for Chrismans they had the rights of

citizens to explore under 2319, Revised Statutes, and at the very best on Miller's discovery of September, 1897, he could take 20 acres under 2331, Revised Statutes, and which he must mark under 2320, Revised Statutes. This the findings do not show he did, nor does the testimony.

But defendants in error urge that it is implied that one individual may take 160 acres of mineral land by one location. Can he? We say no, and now cite the authorities.

Twenty Acres, Only, to One Person.

The act of Congress of 1870 (16 Statutes at Large, chap. 235, p. 217) allowed a placer location of 160 acres to one individual, but the later general mining act of May 10, 1872, modified the original placer law by fixing a limit of 20 acres for each individual claimant, and this limitation to 20 acres was carried into the Revised Statutes, sections 2329–2330, December 1, 1873, and we cite against the "plainly implied" construction of counsel, at page 96 of his brief, McKinley *v.* Wheeler, 130 U. S., 630, 636; the regulations of the Land Department, circular of December 10, 1891, par. 61; Lindley on Mines (2d ed.), vol. I, secs. 447, 448, 448*a*, and section 450 *id.*, at p. 800, where Lindley says: "The statute simply inhibits the acquisition by an "individual of more than twenty acres by a single location;" also note at end of section 450, Lindley on Mines.

It is contrary to the provisions of sections 2330–2331, Revised Statutes of the United States, "for one person to cover "more than 20 acres of placer ground by one location."

Durant *v.* Corbin, 94 Fed., 382.

Also Snyder on Mines, vol. I, sec. 315, and note.

McDonald *v.* Montana Co., 14 Mont., p. 88; 35 Pac. Rep., 668.

The non-partizan construction of the statute by the above-named authorities is the one we hope that will have weight against the opinion of counsel for Miller.

Miller wanted 160 acres of placer land, and the State court decided that he should have it, in defiance of the act of Congress of *May 10, 1872, section 2330 of the* Revised Statutes of the United States.

What is the Issue, and What Did the State Courts Decide?

This suit is to quiet title, and the defendants are stated to claim an interest adverse to the plaintiffs, and ownership and actual possession at the commencement of the action, under the title of the owner, is alleged, and the prayer is that defendants have no right and that they be enjoined.

That was the issue tendered, and the findings must be limited to the ultimate facts pleaded. The only ultimate facts to be determined were those from which ownership could be deduced, and the *nisi prius* court did make findings from which it concluded that Miller was the owner and in the possession at the time suit commenced.

The supreme court of California held in San Diego *v.* Allison, 46 Cal., 163, that the fact that plaintiff was in posses sion did not entitle him to judgment; that possession is not title, but only evidence from which title may be presumed.

See also—

Adams *v.* Crawford, 116 Cal., 501.
Deffeback *v.* Hawke, 115 U. S., 392.
Thallman *v.* Thomas, 111 Fed. Rep., 277.
Ketts *v.* Austin, 83 Cal., 167.
17 Cyclopædia Pl. & Pr., p. 361.

The Issue is Not as Claimed by Defendants in Error.

But the facts are not found as the defendants in error contend.

In the sense claimed by defendants in error the review of this court can be had only upon the findings of the supreme court and of the superior court of California. Taking the

findings of both courts—and excluding the conclusions of law—and all of the questions that we have raised manifestly appear of record, and the case we contend should, because of those errors which we have pointed out, be reversed.

The supreme court of California states that all the parties claim by locations made under the mineral laws of the United States (Record, p. 121), and states the questions raised upon that page and page 126 of the record. The supreme court finds at page 122, folio 218, of the record and upon page 124 of the record as to the facts upon the discovery of oil made by Barieu and plaintiffs in error, and our entry was peaceable and sufficient of record. (See page 24, findings XIII and XIV, Record.)

DEFENDANTS IN ERROR IGNORE THE FINDINGS OF THE SUPREME COURT OF CALIFORNIA AND URGE CONCLUSIONS OF THE TRIAL COURT AS FINDINGS OF FACT.

The facts are misstated, and, further, all of the facts are not stated at page 68 of brief of defendants in error, nor is there anything in the record, as stated in said brief at page 78 thereof, that the entry of the Chrismans (plaintiffs in error) was surreptitious, and the trial court did not so state (see findings XIII and XIV, pp. 24–25 Record), but did of intervenors, whom we do not represent.

To begin logically at the commencement of this controversy, our position, first, is that the State courts were wrong in assuming any title in Miller and associates originating on December 31, 1896, for the reason that there was then a valid existing location on the premises, made by Barieu in 1895, which expired with the end of 1896. This Barieu location the State courts turned down as matter of *law* because there was no "discovery" under section 2320 of the Revised Statutes of the United States.

Section 2320 of the Revised Statutes of the United States says: "But no location of a mining claim shall be made "until the discovery."

Therefore *discovery* is a matter of law as much as certain marks upon the ground.

McKinley Mg. Co. *v.* Alaska Mg. Co., 183 U. S., 563, 570.

As to this subject the supreme court of California found and concluded:

"Upon the question of discovery the sole evidence is that "of Barieu himself. Giving fullest weight to that testimony "it amounts to no more than this, that Barieu had walked "over the land at the time he posted his notice and had dis- "covered 'indications' of petroleum. Specifically, he says "he saw a spring and 'the oil comes out and floats over the "'water in the summer time when it is hot. In June 1895, "'there was a little water with oil and a little oil with water "'coming out. It was dripping over a rock about two feet "'high. There was no pool: it was just dripping a little "'water and oil, not much water.' This is all the 'dis- "'covery' which it is even pretended was made under the "Barieu location, and we think it clear that such testimony "does not establish a discovery within the meaning of the "law."

The supreme court of California therefore finds that such facts as are above found are *mere indications* and are not a "discovery" within section 2320, Revised Statutes of the United States, and said court mistakenly cites Nevada Sierra Oil Co. *v.* Home Oil Co., 98 Fed. Rep., 673, as authority.

In arriving at the above conclusion the supreme court of California overrules the United States courts very generally. For instance, in Nevada Sierra Oil Company, 97 Fed. Rep., 681, 683, United States Circuit Judge Ross held as *matter of law* that such facts constituted a discovery. We repeat that Judge Ross, upon demurrer to a bill in equity which stated similar facts, overruled the demurrer, and thus held as a conclusion from those facts that a sufficient discovery was pleaded.

Judge Ross again in the 98 Fed. Rep., at pages 675-676, said:

"So, in respect to placer claims, if a competent locator act-
"ually finds upon unappropriated public land petroleum or
"other mineral in or upon the ground, and so situated as to
"constitute a part of it, it is a sufficient discovery, within the
"meaning of the statute, to justify a location under the law
"without waiting to ascertain by exploration whether the
"ground contains the mineral in sufficient quantity to pay."

The California supreme court also overrules the Supreme Court of the United States in Erhardt *v.* Boaro, 113 U. S, 527, where it is said:

"There must be *something* beyond a mere guess * * *
"such as the discovery of the precious metals *in it*, or in such
"*proximity* to it as to justify a reasonable belief in their ex-
"istence." (Italics ours.)

The truth of the matter is that the supreme court of California got mixed in the cases and mistook a decision of the same title by Judge Ross, where he held that seepages of oil upon an *adjoining* piece of land, but *not in suit*, was only an indication of oil *upon* land *in suit*, and *therefore* not a discovery. Nor was the case upon which the California court went wrong respecting the land claimed by the plaintiffs in error, as stated in the opinion. We concede that indications are not the thing itself, but oil is oil, and oil seeping or oil coming out of the ground is a physical fact. It is an indication of *quantity*, more or less, and probably more continuous than grains of gold in auriferous gravel which have broken down from the ledges to the sands and subjected to torrential seasonal washings, while oil, like the water spring, is continuous to its head; to follow leads to the body or end.

Our Defense Goes Beyond All Claims of Defendants in Error.

But we take a further position than that. For the sake of the argument only, grant that we are but poor prospectors who enter peaceably and seek to work upon this land to find minerals. The defendants in error have no title and cannot maintain in court an action against us to quiet our claims, because we are acting under the privilege given by Congress.

The defendants in error could take but twenty acres for one person, and they never even marked that, and his possession in the largest sense would only be of *such size as law* allows to a claim (English *v.* Johnson, 17 Cal., 108), to wit, twenty acres.

But we are mere prospectors; that is admitted solely for the sake of this argument.

Therefore we have the right, under the act of 1866, now section 2319, Revised Statutes of the United States, to enter upon the vacant mineral lands of this Government and explore for minerals and metals, and such land is vacant until discovery under section 2320, Revised Statutes of the United States.

If they had remained in actual possession under their claim of the premises, "the law is well settled that the mere occupancy of the public land and improvements thereon give no vested right therein. * * * The defendant * * * had made no such location as prevented the lands *being in law vacant.*"

Olive Co. *v.* Olmstead, 103 Fed. Rep., 572.

(The italics are ours.)

See, also, Erhardt *v.* Boaro, 113 U. S., 536, where Mr. Justice Field said:

"It would not initiate any right."

"It may be considered settled that mere possession alone "gives no right against a *bona fide* miner or prospector seek- "ing to acquire title to the land as a mining claim."

Snyder, vol. I, sec. 234, top page 202.

"In other words, where there is no valid location there "can be no rightful possession."

Id., end of sec., middle of page.

"By some of the earlier decisions it was held that one in "possession of public domain * * * was deemed right- "fully in possession. * * * But later decisions held, "and the rule today is, that a mere squatter upon the public "domain has not the right to maintain possession against "one peaceably seeking to effect the location of a mining "claim in a lawful way."

Snyder on Mines, vol. I, sec. 236, p. 204.

It must be treated as Government land up to the time of discovery.

Tuolumne Co. *v.* Maier, 134 Cal., 583–586.

In Burns *v.* Clark, 66 Pac. Rep., 12, it is held occupation as millsite gives no title to minerals.

If a party goes upon the mineral lands of the United States and either establishes a settlement or works thereon without complying with the requirements of the mining laws, and relies exclusively upon his possession or work, a second party who locates peaceably a mining claim covering any portion of the same ground, and in all respects complies with the requirements of the mining laws, is entitled to the possession of such mineral ground to the extent of his location as against the prior occupant, who is, from the time said second party has perfected his location and complied with the laws, a trespasser.

Lindley on Mines, vol. I, pp. 378–9, subdiv. 2 and 3.

Citing—

Horswell *v.* Ruez, 67 Cal., 111.

The peaceable adverse entry by the locator, coupled with the perfection of his location, operates in law as an ouster of the prior occupant.

Lindley on Mines (2d ed.), sec. 219, p. 379.

Citing—

Belk *v.* Meagher, 3 Mont., 65–80.

Location will *date from* the time discovery is made.

Lindley on Mines (2d ed.), sec. 330, quoting:

"The validity of the location * * * is made to de-"pend primarily upon the discovery. * * * (Sec. 2330 "R. S.) *Until* such discovery, *no* rights are acquired by loca-"tion. * * * (Other acts not imperative) * * * but "not so discovery, for it is upon *that act* that the very *life* of "a mineral location *depends;* and from the time of such dis-"covery *only* would the location be valid, provided, of "course, that *others* had not acquired rights therein."

Beals *v.* Cone, 27 Colo., 473.

(Italics are ours.)

See also Erwin *v.* Perigo, 93 Fed., 608.

Counsel for defendant in error relies upon the doctrine of Atherton *v.* Fowler, 96 U. S., 513. We have no criticism of that case. The rule is well understood in the West. The doctrine thereof was before the Supreme Court of the United States in Belk *v.* Meagher, 104 U. S., 279–284. Atherton *v.* Fowler treated of agricultural lands, while Belk *v.* Meagher was a mining case. It never has been the policy of our Government to initiate title through fraud or force.

We cite to the court Lindley on Mines (2d ed.), vol. I, sec. 218.

To carry the doctrine of Atherton *v.* Fowler to the extent claimed by counsel would prevent any entry upon a mine, would prevent the cutting down of too large a claim; still the courts have considered such cases.

The Supreme Court of the United States, in Del Monte Co. *v.* Last Chance (171 U. S., 55, 79–84), held that a junior mining locator might enter upon the surface of a senior valid existing location and lay surface lines of the junior location across the senior location so long as he did so peaceably.

The circuit court of appeals for the ninth circuit held to a like doctrine in Empire State *v.* Bunker Hill, 114 Fed. Rep., 417, 419, and the last-named court went further in this case, and said the junior could establish his surface corners and lines upon patented senior locations so long as it was done openly and peaceably.

See also to same effect:

Bunker Hill Co. *v.* Empire State, 109 Fed., 538, 542.
Hidee Lode, 30 Land Dec., 420.
Mono Fraction, 31 L. D., 122.
Alice Lode, 30 L. D., 481.

If the discovery point is lost, by a patent covering it being granted to another, loses the remainder of the claim.

Gevillim *v.* Donellan, 115 U. S., 45–50; 5 Sup. Ct. Rep., 1110.

If location is made larger that the law allows the excess is invalid.

Richmond *v.* Rose, 114 U. S., 576, 580; 5 Sup. Ct., 1055.
Glacier Mt. *v.* Willis, 127 U. S., 471–481; 8 Sup. Ct., 1214.

Worthless for any purpose—if too large.

Ledoux *v.* Forester, 94 Fed., 600.
Hansmith *v.* Butcher, 4 Montana, 299.

How can there be an attack upon a paper location?

How can there be a forfeiture or a relocation under the present theory of counsel for defendants in error?

By what means were the last-cited cases gotten before a court?

Counsel asserts that the putting up of monuments around and posting a notice with eight signatures upon a 160-acre piece of land and thereafter seven of these men conveying to one and *then* the one making the discovery is good as to 160 acres, and the supreme court of California seemed to take that view of it upon the theory suggested that it was the same as a co-owner failing to do his share of the annual labor or assessment-work under section 2324, Revised Statutes of the United States.

The two propositions are not similar. There is a vested right—there is title—in the cases provided for under section 2324, Revised Statutes of the United States. In the other case there is no right or title to be affected except the prospector. He who drops out loses. No one else is hurt. The man who stops exploring or prospecting can get no 20-acre tract. It is his loss and that of no one else.

Section 2324 requires $100 to be expended each year upon mining locations or else they are forfeited. To provide against one co-owner standing back without expense and making the other claimants make all expenditures Congress planned to have the man who would not put up forfeit to his co-owner, who did protect the property.

Therefore the defense asserted by counsel and misapplied by the supreme court of California in the case at bar is not a logical one.

In conclusion, we beg leave to say that the other questions at issue are considered at length in our other briefs now on file, and we most respectfully submit that the judgment should be reversed.

J. C. Campbell,
W. H. Metson,
Counsel for Plaintiffs in Error.

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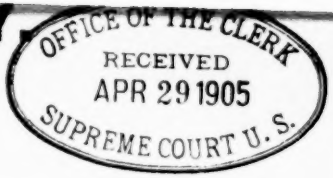

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 171.

A. Y. CHRISMAN ET AL., PLAINTIFFS IN ERROR,

vs.

E. O. MILLER ET AL.

PETITION FOR REHEARING.

J. C. CAMPBELL,
W. H. METSON,
Attorneys and Counsel for Plaintiffs in Error and Petitioners.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 15778

SUPREME COURT OF THE UNITED STATES.

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A. Y. CHRISMAN ET AL., PLAINTIFFS IN ERROR,

vs.

E. O. MILLER ET AL., DEFENDANTS IN ERROR.

OPINION FILED APRIL 3, 1905.

PETITION FOR REHEARING.

The plaintiffs in error most respectfully apply to the Supreme Court of the United States for a rehearing of this cause upon the ground that the main question—the most important point—submitted to it for decision in this cause has not been even mentioned by the Supreme Court of the United States in its opinion.

Said point appears in the findings of the trial court, and was presented in all the briefs filed on behalf of plaintiffs in error and in the oral argument. It is that one locator is given 160 acres of placer land, when the Statutes of the United States give him the right to 20 acres only.

This was the point upon which Chief Justice Beatty, of the supreme court of California, dissented (Record, pp. 121–128).

Section 2331 of the Revised Statutes of the United States.

Acknowledging everything that is said in the opinion of the Supreme Court of the United States, filed on April 3, 1905, this question is still undecided, and we respectfully submit that after the time, labor, and expenditure that has been given in presenting this most important point to the Supreme Court of the United States we should be excused for petitioning for a rehearing.

The point that we make is a part of the findings of the trial court, and it appears specifically from findings 8, 9, 10, and 15 (Record, pp. 23–25).

The Supreme Court of the United States, in its opinion filed on April 3, 1905, confirms the doctrine laid down by section 2320 of the Revised Statutes that no location of a mining claim shall be made until the *discovery* of the vein or lode within the limits of the claim located, and therefore it follows that until discovery no rights accrue, and, if so, our point should be good.

To state the point as clearly as we can, it is found by the trial court in the findings mentioned that *without discovery* eight men posted a notice and put up monuments marking the boundaries of 160 acres of public lands on December 31, 1896; that thereafter, on the 31st day of July, 1897, seven of these men conveyed to the eighth, E. O. Miller, and this eighth man, Miller, *still without discovery*, on the 17th day of September, 1897, leased to the Home Oil Company, and the Home Oil Company sunk a well and got a flow of petroleum, and that this well and the oil exuding therefrom *was* the ONLY DISCOVERY upon said lands. Therefore, if the Supreme Court of the United States is right—if section 2320 and section 2331 of the Revised Statutes mean anything—this decision gives to Miller 160 acres of land, when the law says he shall have but 20.

That this is the law was so held in Durant *vs.* Corbin, 94 Fed., 382. It is so laid down in Lindley on Mines, section 450, and by Snyder on Mines, section 315.

These propositions were duly presented to the Supreme

Court of the United States in the brief of plaintiffs in error, at pages 63 to 86, and in the reply brief for plaintiffs in error, at pages 7 and 8.

Notwithstanding that the Supreme Court of the United States has in this opinion, as we understand it, overruled Judge Ross, of the circuit court for the ninth circuit, in the case of Nevada Sierra Oil Co. *vs.* Home Oil Co., at pages 681–683, 97 Federal Reporter, and again overruled him in the 98th Federal Reporter, at pages 675 and 676, and the case of Erhardt *vs.* Boaro, 113 U. S., pages 527 and 536, and Book *vs.* Mining Co., 58 Federal Reporter, pages 106 and 120, nevertheless, it having spoken, we gladly accept the opinion in this case as a correct exposition of the law, but we most respectfully urge the Supreme Court of the United States that it has evidently inadvertently failed to mention or pass upon the salient point presented on the appeal, and request a rehearing.

Respectfully submitted.

J. C. CAMPBELL,
W. H. METSON,
Attorneys and Counsel for Plaintiffs in Error and Petitioners.

CERTIFICATE OF COUNSEL.

We, the undersigned attorneys and counsel for said A. Y. Chrisman *et al.*, plaintiffs in error and petitioners herein, do hereby certify that in our opinion there is just ground in point of law for the allowance of a rehearing in said cause.

J. C. CAMPBELL,
W. H. METSON,
Attorneys and Counsel for Plaintiffs in Error and Petitioners.

Filed June 12 1905
JOHN D. [illegible]
Clerk

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1904.

No. 171.

A. Y. CHRISMAN and H. T. CHRISMAN,
Plaintiffs in Error,

v.

E. O. MILLER and THE HOME OIL COMPANY,
Defendants in Error.

Brief of Defendants on Motion to Dismiss or Affirm.

L. L. Coey,
Attorney and Counsel for Defendants in Error.

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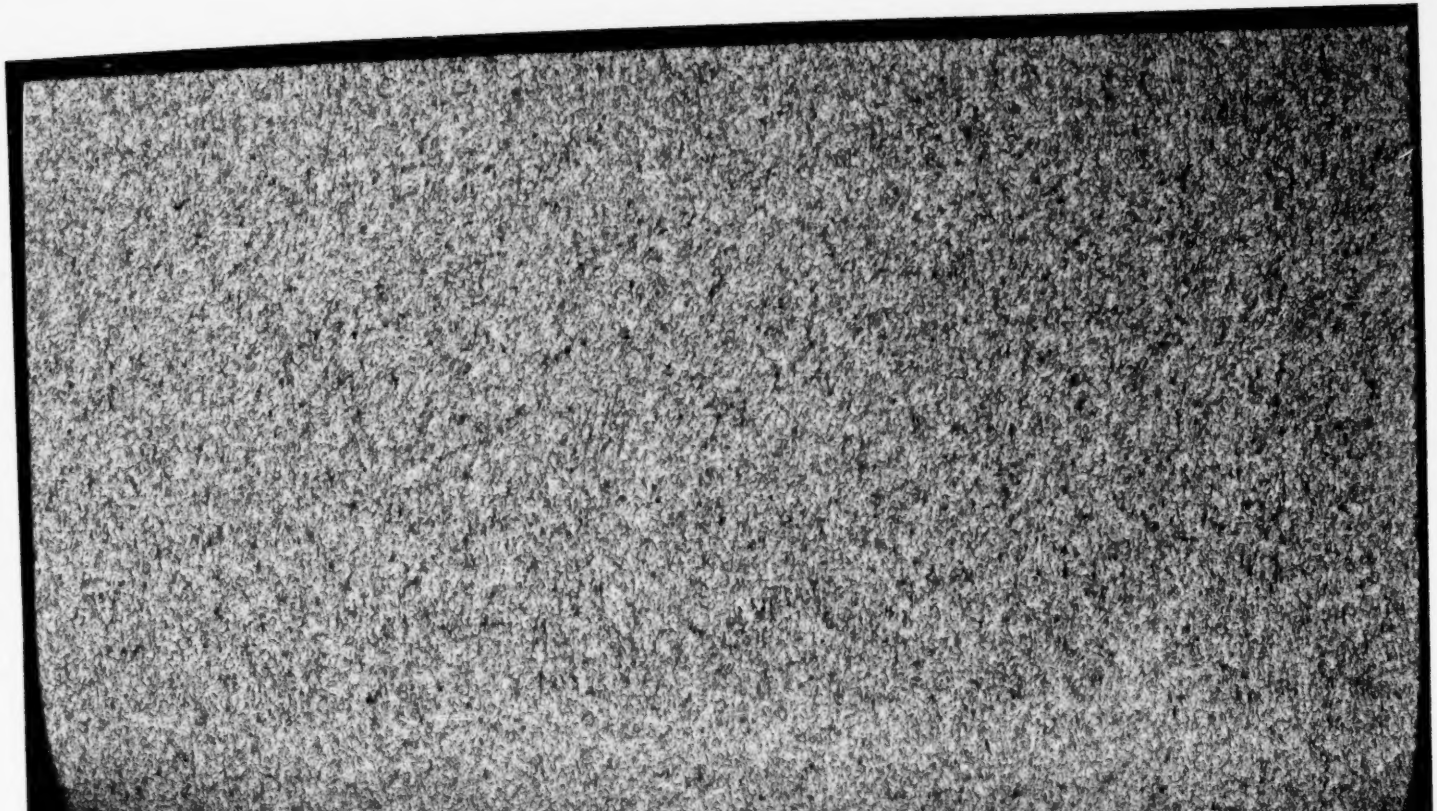

IN THE

SUPREME COURT

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October Term, 1904.

No. 171.

A. Y. CHRISMAN and H. T. CHRISMAN,
Plaintiffs in Error,

v.

E. O. MILLER and THE HOME OIL COMPANY,
Defendants in Error.

Brief of Defendants on Motion to Dismiss or Affirm.

Come now E. O. Miller and The Home Oil Company, a corporation, and move this court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because no Federal question was set up or claimed in this cause before the Supreme Court of the State of California, and, also, because the decision of the Supreme Court of the State of Cal-

ifornia was based upon a ground which did not involve a Federal question, and which was broad enough to support the judgment.

And the said defendants in error also move the court to affirm the said judgment or decree, from which said writ of error purports to have been taken, because, although the record in the said cause may show that this court has jurisdiction in the premises, yet, it is manifest that said writ of error was taken for delay only, is frivolous, and does not need further argument.

L. L. Cory,

Attorney and Counsel for Defendants in Error.

STATEMENT OF FACTS.

The facts in this case, in so far as it is necessary for them to be considered on this motion, are as follows:

The contest arose because of conflicting claims to 160 acres of placer mining ground, in the County of Fresno, State of California. The plaintiffs, the intervenor, and the defendants each claimed title to the property under respective placer mining locations. The intervenor, not having joined in the application for a writ of error, need not further be considered. On the 31st day of December, 1896, E. O. Miller, one of the defendants in error, and his seven associates filed a notice of location on the premises in controversy, claiming the same as a placer mining location. He, thereupon, marked the boundaries of his claim so that they could be readily traced, and thereafter, and on January 5th, 1897, recorded a copy of the notice of location in the County Recorder's Office of said County of Fresno. On September 17th, 1897, E. O. Miller, who had acquired all the interests of his co-locators in the property, leased the premises to one Frank Barrett, who immediately, and on the same day, assigned the lease to The Home Oil Company, the other defendant in error. Under that lease, the Home Oil Company went into possession of the premises and prosecuted the development of the claim diligently, discovering valuable deposits of petroleum and oil at a depth of about 700 feet in the first well drilled by it. The further development of the territory by it determined that the particular land in controversy is of very great value.

The claims of the plaintiffs in error depend upon the validity of two placer mining locations made by them respectively, on January 1st, 1897, each covering 20 acres of the land previously located by E. O. Miller and his associates. The

notices of location of these two claims were posted upon the ground and the boundaries of the claims were marked so they could be readily traced, but no discovery of oil or other mineral was ever made by either of the plaintiffs in error within the boundaries of their respective claims, the finding of the lower court being that the only discovery of oil within the limits of the 160 acres covered by the location of E. O. Miller and his associates was that made by The Home Oil Company, as stated.

On October 14th, 1898, the defendants in error commenced an action against the plaintiffs in error in the Superior Court of the County of Fresno, State of California, for the purpose of quieting their title against the alleged claims of the plaintiffs in error. The defendants answered and the case came on regularly for trial by the court without a jury, and, after a somewhat lengthy and protracted trial, a judgment was rendered in favor of the plaintiffs in that case, affirming the validity of the location under which they claimed title to the premises, and finding, as the ultimate facts, that E. O. Miller and his co-locators, citizens of the United States, located the land as a placer mining claim upon vacant land of the United States; that their notice of location was properly posted; that the boundaries of the claim were marked so that they could be readily traced; that The Home Oil Company, ever since its lease, has been, and was, at the time of the commencement of the action, in the *actual, exclusive* and *peaceable possession* of the entire 160 acres, and that the only discovery of oil made thereon was that made by The Home Oil Company in the well which it so drilled; that the defendants had not any right, title or claim in and to any portion of the property, *that neither of them had ever made any discovery of mineral, petroleum or oil,* within the boundaries of either of

their claims, and adjudged the claims of the defendants to be invalid and groundless.

From this judgment an appeal was taken to the Supreme Court of the State of California, the result of which appeal being that the judgment of the lower court was affirmed, the opinion being a part of the record in this case. The decision was rendered *in banc*, all of the Justices concurring, with the exception of the Chief Justice, who, thereafter, and upon application of the plaintiffs in error, granted the writ of error now under consideration. Twenty-two errors are assigned in support of the writ of error so obtained. Errors 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 16, 17, 18 and 20, all relate to findings of fact based upon sufficient evidence which facts were found adverse to the contention of the plaintiffs in error, and which are not open to review by this court. The other assignments of error do not pretend to be based upon any Federal question and relate to matters as to which no issue was presented by the pleadings.

ARGUMENT.

MOTION TO DISMISS.

1. No Federal Question was set up or claimed in the court below.

The first ground on which is based our motion to dismiss the writ of error for lack of jurisdiction is that no Federal question was set up or claimed in the court below. The pleadings printed in the transcript of the record fail to show any reference to the Constitution of the United States or any of the laws of the United States, either directly or indirectly, and the record of the trial and appellate proceedings also fail to show any such claim set up or made, at any time, or at any place.

There are certain Federal questions which need not be raised in the lower court, but this is not one of them. This particular Federal question is one of the third class enumerated in Section 709 of the Revised Statutes.

In the case of Columbia W. P. Co. v. Columbia E. S. R. L. & P. Co., 172 U. S., 475, this court said:

"To the argument that the Federal right was not 'specially set up and claimed' in the language of Revised Statutes, Section 709, it is replied that this is not one of the cases in which it is necessary to do so. Under this section there are three classes of cases in which the final decree of a state court may be re-examined here:

1. " 'Where is drawn in question the validity of a statute of, or an authority exercised under, the *United States*, and the decision is *against their* validity;'

2. "'Where is drawn in question the validity of a statute of, or an authority exercised under, any *State* on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision *is in favor of* their validity;'

3. "'Or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is *against* the title, right, privilege, or immunity *specially set up and claimed* by either party under such Constitution, statute, commission, or authority.' There is no doubt that under the third class the Federal right, title, privilege, or immunity must be, with possibly some rare exceptions, specially set up or claimed to give this court jurisdiction. Spies v. Illinois, 123 U. S., 131, 181, (31:80, 91); French v. Hopkins, 124 U. S., 524 (31:536); Chappell v. Bradshaw, 128 U. S., 132 (32:369); Baldwin v. Kansas, 129 U. S., 52 (32:640); Leeper v. Texas, 139 U. S., 462 (35:225); Oxley Stave Co. v. Butler County, 166 U. S., 648 (41:1149)."

It is true that no particular form of words or phrases is necessary to comply with the requirement that the Federal right be specially set up or claimed.

Green B. & M. Co. v. Patten Paper Co., 172 U. S., 58.
Dewey v. Des Moines, 173 U. S., 193.

But averments to present such a question must be so distinct and positive as to place it beyond question that the party bringing the case from the State court intended to assert a Federal right.

Michigan Sugar Co. v. Michigan, 185 U. S., 112.

In the case of F. G. Oxley Stave Co. v. Butler County, 166 U. S., 648, this court went fully into the question of the

necessity for the claim to have been "specially set up and claimed" before the lower court. It was there said:

"But can it be said that the plaintiffs '*specially* set up or claimed' the protection of that amendment against the operation of that decree by simply averring—without referring to the Constitution, or even adopting its phraseology—that the decree was passed against deceased persons, as well as in the absence of necessary or indispensable parties?

"This question must receive a negative answer, if due effect be given to the words 'specially set up or claimed' in Section 709 of the Revised Statutes. These words were in the twenty-fifth section of the Judiciary Act of 1789 (1 Stat. 85), and were inserted in order that the revisory power of this court shall not extend to rights denied by the final judgment of the highest court of a State, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the Constitution, treaties, or Statutes of the United States. The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States, or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference.
* * *

"Upon like grounds the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a

case here from such a court intended to assert a Federal right."

And this conclusion has been repeatedly reaffirmed and we call attention to the following cases where the rule has been laid down and which is applicable to this case:

"But when the jurisdiction of this court is invoked for protection against the final judgment of the highest court of a State, of some title, right, privilege or immunity secured by the Constitution or laws of the United States, it must appear expressly or by necessary intendment, from the record, that such right, title, privilege or immunity was 'specially set up or claimed' under such Constitution or laws. Rev. St., 709. Our jurisdiction cannot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case up intended to assert a Federal right."

Kipley v. Illinois, 170 U. S., 182.

"If a party to an action in a state court intends to invoke for the protection of his rights the Constitution of the United States, or some treaty, statute, commission, or authority of the United States, he must so declare."

Chapin v. Fye, 179 U. S., 127.

In which case the party clearly raised a Federal question, but inadvertently named the Fifth and Seventh Amendments to the Constitution instead of the Fourteenth Amendment, but this was held insufficient and the writ of error was dismissed.

"The rule is firmly established, and has been frequently reiterated, that the jurisdiction of this court to re-examine the final judgment of a state court, under the third division of section 709, cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond any

question that the party bringing the case here from such court intended to assert a Federal right. The statutory requirement is not met unless the party unmistakably declares that he invokes, for the protection of his rights, the Constitution, or some treaty, statute, commission or authority, of the United States. Applying this rule to the case before us, the writ of error cannot be maintained."

Michigan Sugar Co. v. Michigan, 185 U. S., 112.

"To give us jurisdiction under section 709, of the Revised Statutes, because of the denial by a state court of any title, right, privilege, or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was 'specially set up or claimed' at the proper time in the proper way. To be reviewable here, the decision must be against the right *so set up or claimed.*"

Jacobi v. Alabama, 187 U. S., 133.

The Federal question relied upon to confer this jurisdiction cannot first be raised in the Supreme Court of the United States.

Quimby v. Boyd, 128 U. S., 488.

Sweringen v. St. Louis, 185 U. S., 38.

Neither is it raised in time when it first appears in the petition for writ of error from the Supreme Court of the United States to the State Court.

Johnson v. N. Y. Life Ins. Co., 187 U. S., 491.

Telleride P. T. Co. v. Rio Grande W. Ry. Co., 187 U. S., 569.

It is not in time when first presented on an application for a rehearing in the highest court of the state.

Capital Nat. Bank v. First Nat. Bank, 172 U. S., 425.
Easter B. & L. Assn. v. Welling, 181 U. S., 47.
Weber v. Rogan, 188 U. S., 10.

In the case of Mutual Life Ins. Co. v. McGrew, 188 U. S., 291, Chief Justice Fuller, speaking for the court says:

"Our jurisdiction of this writ of error is asserted under the third of the classes of cases enumerated in Sec. 709 (U. S. Comp. Stat. 1901, p. 575), and it is thoroughly settled that, in order to maintain it, the right, title, privilege, or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way.

"The proper time is in the trial court whenever that is required by the state practice, in accordance with which the highest court of a state will not revise the judgment of the court below on questions not therein raised. Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; Jacobi v. Alabama 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48; Layton v. Missouri, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137; Erie R. Co. v. Purdy, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605.

"The proper way is by pleading, motion, exception, or other action, part, or being made part, of the record, showing that the claim was presented to the court. Loeb. v. Columbia Twp. 179 U. S. 472, 481, 45 L. ed. 280, 286, 21 Sup. Ct. Rep. 174. It is not properly made when made for the first time in a petition for rehearing after judgment; or in a petition for a writ of error; or in the briefs of counsel not made part of the record. Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Zadig v. Baldwin, 166 U. S. 488, 41 L. ed. 1088, 17 Sup. Ct. Rep. 639. The assertion of the right

must be made unmistakably, and not left to mere inference. F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709. * * * Jurisdiction may be maintained where a definite issue as to the possession of the right is distinctly deducible from the record and necessarily disposed of, but this cannot be made out by resort to judicial knowledge. Powell v. Brunswick County, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; Mountain View Min. & Mill. Co. v. McFadden, 180 U. S. 533, 45 L. ed. 656, 21 Sup. Ct. Rep. 488; Arkansas v. Kansas & T. Coal Co., 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47." * * *

"We do not find that any claim under the treaty was made in the trial court, and the rule of practice of the supreme court of California is that it will not pass on questions raised for the first time in that court, and which might and should have been raised in the trial court. Stoddard v. Treadwell, 29 Cal. 281; King v. Meyer, 35 Cal. 646; Deady v. Townsend, 57 Cal. 298; Williams v. McDonald, 58 Cal. 527; Anderson v. Black, 70 Cal. 226, 231, 11 Pac. 700."

In this connection it is settled law that a judgment or decree of a state court cannot be re-examined in this court simply because a Federal question was presented to the state court for a determination. That court must also decide it.

Detroit City Ry. Co. v. Guthard, 114 U. S. 133.

Israel v. Arthur, 152 U. S. 355.

Whether the Federal claim was properly and sufficiently set up is a question for this court and any statement by the court below or by any of its members does not bind this court.

As was said in the late case of *Erie Railroad Co. v. Purdy*, 185 U. S., 148:

"We state the matter in this way because, as said in Carter v. Texas, 177 U. S. 442, 447, 'the question whether a right

or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the state. Neal v. Delaware, 103 U. S., 370, 396, 397; Mitchell v. Clark, 110 U. S., 633, 645; Boyd v. Thayer, 143 U. S. 135, 180.'"

And it has been held that a certificate by the Chief Justice of the Supreme Court of the State is insufficient to give this court jurisdiction, but that such a certificate may be used to make certain and specific what is too general and indefinite in the record.

See Yazoo & Miss. Railroad Co. v. Adams, 180 U. S. 41, and cases cited.

It was held in Zadig v. Baldwin, 166 U. S., 485, that statements from the briefs filed in the Supreme Court of the State were not proper to show that the Federal question was raised in the lower court, and this has never been overruled.

But in New York Central Railroad Co. v. New York, 186 U. S., 269, it was said:—

"But assuming, without intimating an opinion to that effect, that the raising of a Federal question in the brief might be sufficient, it is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth."

And the court looked at the briefs to see if the Federal question was raised in them, and found it was not.

It is to the record alone, as sent up to this court, that resort can be had for the purpose of ascertaining whether the judg-

ment of the state court sought to be reviewed is within its appellate jurisdiction.

Inglee v. Coolidge, 2 Wheat, 363.

Goodenough H. Mfg. Co. v. Rhode Island H. Co., 153 U. S. 635.

Spies v. Illinois, 123 U. S., 131.

In determining whether the record shows any case for the exercise, by the Supreme court of the United States, of its appellate jurisdiction over state courts, that court is not at liberty to resort to forced inferences and conjectural reasoning, or possible, if not probable, suppositions of the points raised in and decided by the state courts.

Ocean Ins. Co. v. Polleys, 13 Pet. 157.

But it must appear on the face of the record that a Federal question did arise in the state court, and that it was decided.

Gray v. Coan, 154 U. S. 589.

Clark v. Penn. 128 U. S. 395.

In the case of Hooker v. Los Angeles, 188 U. S. 314, it is said:

"The truth is there is nothing in this record adequately showing that the state courts were led to suppose that any claim under the Constitution of the United States was made by plaintiffs in error, or that any ruling involved a decision against a right set up by them under that instrument.

"In Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777, after stating the contention of the plaintiff in error that the effect of the judgment of the state court was 'to deprive him of his property without due process of law, or to deny him the equal protection of the laws, and amounted to a decision adverse to the right, privilege, or immunity of plaintiff in error under the Constitution, of being protected

from such deprivation or denial,' we said: 'But it nowhere affirmatively appears from the record that such a right was set up or claimed in the trial court when the demurrer to the complaint was overruled, or evidence admitted or excluded, or instructions given or refused, or in the supreme court in disposing of the rulings below. * * * * We are not called on to revise these views of the principles of general law considered applicable to the case in hand. It is enough that there is nothing in the record to indicate that the state courts were led to suppose that the plaintiff in error claimed protection under the Constitution of the United States from the several rulings, or to suspect that each ruling as made involved a decision against a right specially set up under that instrument. And we may add that the decisions of state tribunals in respect of matters of general law cannot be reviewed on the theory that the law of the land is violated unless their conclusions are absolutely free from error.'"

In the case of Home for Incurables v. City of New York, 187 U. S. 155, speaking to the question as to what the record must necessarily show in order to vest jurisdiction in this court, Justice Harlan said:—

"The plaintiff insists here that the state court by its final judgment, refused to recognize certain rights belonging to it under the Constitution of the United States. But it does not appear on the face of the record that it set up or claimed any such right until it reached this court. In Parmelee v. Lawrence, 11 Wall. 36, 38, 20 L. ed. 48, 49, this court—following the previous cases of Lawler v. Walker, 14 How. 152, 14 L. ed. 365, and Mississippi & M. R. Co. v. Rock, 4 Wall. 177, 18 L. ed. 381—said it was essential to our jurisdiction, in reexamining the judgment of the state court, that the alleged conflict between the state law and the Constitution of the United

States 'appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the rulings of the court,' or 'it must be that such a question was necessarily involved in the decision, and that the state court would not have given a judgment without deciding it.' Later cases in this court, have expressed the additional thought that, if the highest court of the state assumes that the record sufficiently presents a question of Federal right and decides against the party claiming such right, we will look no further, and will proceed to a consideration of that question, unless the decision is made to rest, in part, upon some ground of local law, sufficient in itself to sustain the judgment, independently of any question of Federal right.

"In the case before us the Home for Incurables has not brought upon the record the fact that it asserted in the state court any Federal right whatever. It is entirely consistent with the record that the Home did not, at any time pending the case in the state court, set up or claim any such right. If our jurisdiction is invoked on the ground that the judgment of the state court has denied a right, title, privilege or immunity secured by the Constitution of the United States, it is essential, under existing statutes, that such right, title, privilege or immunity shall have been specially set up or claimed in the state court. Rev. Stat. 709 (U. S. Comp. Stat. 1901, p. 575); Armstrong v. The Treasurer, 16 Pet. 281, 285, 10 L. ed. 965, 966; Mississippi & M. R. Co. v. Rock, 4 Wall. 177, 180, 18 L. ed. 381, 382; Powell v. Brunswick County, 150 U. S. 433, 439, 37 L. ed. 1134, 1136, 14 Sup. Ct. Rep. 166; Roby v. Colehour, 146 U. S. 153, 159, 36 L. ed. 922, 924, 13 Sup. Ct. Rep. 47; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 654, 41 L. ed. 1149, 1151, 17 Sup. Ct. Rep. 709;

Levy v. San Francisco City & County Super. Ct., 167 U. S. 175-177, 42 L. ed. 126, 127, 17 Sup. Ct. Rep. 769.

"It is true that the transcript contains the certificate of the chief judge of the court of appeals of New York, not appearing to have been by order of that court while the case was before it or under its control, which states that the Home did make, in that court, the Federal questions now pressed upon our consideration. But that certificate is not properly a part of the record. While we have said in some cases that such a certificate is entitled to great respect, and, in other cases that its office is to make that more certain and specific which is too general and indefinite in the record, it is insufficient in itself to give us jurisdiction, or to authorize us to determine Federal questions that do not appear, in any form, from the record, to have been brought to the attention of the state court. Powell v. Brunswick County, 150 U. S. 433, 439, 37 L. ed. 1134, 1136, 14 Sup. Ct. Rep. 166; Newport Light Co. v. Newport, 151 U. S. 527, 537, 38 L. ed. 259, 262, 14 Sup. Ct. Rep. 429; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 41, 47, 45 L. ed. 415, 418, 21 Sup. Ct. Rep. 256; Felix v. Scharnweber 125 U. S. 54, 59, 31 L. ed. 687, 688, 8 Sup. Ct. Rep. 759.

"Having no jurisdiction to examine the judgment below, *the writ of error must be dismissed.*"

The record in this particular case, in accordance with the practice and statutes of the State of California, is composed of the pleadings of the respective parties (pp. 1-21); the findings and judgment of the lower court (pp. 21-33); the notice to move for a new trial, (p. 36), the statement on motion for a new trial prepared by the plaintiffs in error and settled by the court (pp. 38-117); which purports to give all of the proceedings had and testimony taken upon which the

appellants would rely on their appeal to the Supreme Court of the State, together with the particular assignments of error upon which the appellants also rely (pp. 112-116), the notice of appeal and the copy of the opinion of the Supreme Court of the State of California, *in bank* (pp 121-127).

A most minute examination of this record will fail to disclose any attempt on the part of the plaintiffs in error to set up or claim, specially, or otherwise, any title, right, privilege or immunity granted by the Constitution or laws of the United States. In fact, the record is most barren of any such attempt.

The disputed questions in this case arose upon the validity of the different locations asserted respectively by the plaintiffs in error and the defendants in error, the solution of which questions depended upon the determination of disputed and controverted questions of fact, all of which, without exception, were resolved in favor of these defendants in error, all of which fully appears from a reading of the opinion of the Supreme Court.

The only pretext that the plaintiffs in error have for now asserting that any Federal question was ever set up or claimed by them, or either of them, must be based upon a statement in that opinion that it was the contention of the *intervenor*, that the Miller location was invalid and that the effect of the conveyance of his co-locators to Miller, before discovery, operated as an abandonment by them of their locations, and destroyed the validity of the whole location; that the validity of the location thus having been destroyed the subsequent discovery of oil did not, and could not serve to validate it, and at the most could have given Miller, as the sole remaining member of the association, the right to relocate 20 acres upon his discovery (p. 126).

The Supreme Court then proceeds to discuss that propo-

sition. It will be noted that, from the express language of the opinion, it was the intervenor only, who presented this contention to the Supreme Court. How, or in what manner, or where that contention was made by the intervenor the record does not disclose. Nothing is affirmatively, or otherwise, disclosed in the record from which this court can determine how or in what manner that question was set up or claimed, even if it be conceded to be a Federal question. It is a sufficient answer to any argument presented upon that theory by the plaintiffs in error that neither of them ever set up or claimed that any Federal question was ever presented.

In the nature of things, it is impossible for us further to specify or particularize any attempt on the part of these plaintiffs in error to specifically, or otherwise, set up or claim a Federal question. The answer of the defendants denies, in terms, the allegations of the complaint, which placed in issue the validity of the location under which the defendants in error dereigned their title. As a special defense these plaintiffs in error set up the mineral locations attempted to be made on portions of this property by them, and, as a further defense, alleged that the Miller location was made in pursuance of a certain conspiracy between E. O. Miller and his co-laborers and conspirators, and that the other co-locators were so-called "dummy" locators (pp. 8-16).

Certainly there is no pretense of an attempt to set up or claim a Federal question in the answer. An examination of the proceedings had at the trial also discloses no attempt on the part of these plaintiffs in error to set up or claim any Federal question: not an objection was made, nor an exception taken, or a motion for a non suit based upon any pretended theory that any Federal right, title, privilege or immunity was at issue, or that these plaintiffs in error were deprived of the

benefit thereof. The assignments of error upon which the petition for the writ of error was based, do not specify, in terms the invasion of Federal right of the plaintiffs in error.

If by any possibility we can be in error as to any of these statements, counsel for plaintiffs in error will hasten to correct it, and will then point out to this Court how, or in what manner any Federal question was set up or claimed, and we await with interest such a designation from counsel.

In the case of Beals v. Cone, 188 U. S., 184, it appeared that the action was one known in mining regions as an adverse suit brought under the authority of certain sections of the Revised Statutes, and the question presented was as to the priority of right thereto of the respective parties by virtue of discovery and location, which is the precise question which arose and controlled the final determination of the case at bar. A writ of error was obtained from the state court and a motion was made to dismiss or affirm.

Justice Brewer, in delivering the opinion of the court, said:

"The mere fact that this is an action brought under Secs. 2325 and 2326, Rev. Stat. (U. S. Comp. Stat., 1901, pp. 1429, 1430), in support of an adverse claim, does not, of itself, entitle the defeated party to a writ of error. Although brought under the authority of a Federal Statute, the questions involved may be only of general or local law. Blackburn v. Portland Gold Min. Co., 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; Shoshone Min. Co. v. Rutter, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726. * * * *

"The record of the trial which took place before the jury, is voluminous,—the bill of exceptions, containing the testimony, the instructions, and the proceedings on the motion for a new trial, filling 436 printed pages. The testimony was mainly directed to such matters of fact as the time and place of dis-

covery of mineral, the character of the veins, the per cent. of mineral, and the general nature of the rock formations in which the veins were alleged to have been discovered. From the beginning of the trial to the end of the testimony there appears no single distinct claim based upon the Constitution or statutes of the United States. No statute of the State of Colorado was questioned, nor was any right, title, privilege, or immunity under the Constitution or laws of the United States specially set up or claimed. In the instructions asked and refused, as well as in those given, there is only a general mention of the laws of the United States, and none of any particular statute. In the motion for a new trial, as well as in the assignments of error in the supreme court of the state, there is not the slightest reference to the Constitution, the laws of the United States, or any section or part thereof. And in the opinion of the Supreme Court, outside of the matters of estoppel and *res judicata* before referred to, there is nothing to even suggest that it was requested to consider any question of a title, right, privilege, or immunity under the Constitution or laws of the United States. Indeed, while the case has evidently been hotly contested, yet the matters which were subjects of controversy and determination were questions of fact concerning the time, extent and effect of the alleged discoveries of mineral, and also alleged wrongs in respect to the jury. To those matters and to those alone, was the attention of the parties and the courts directed. * * * One cannot, however, fail to be impressed, after a perusal thereof with the fact of a failure to recognize that there is no general right to a writ of error from this court to the courts of a state; that there is but a special right, a right to bring such cases, and such cases only, as disclose a Federal question distinctly ruled adversely to the plaintiff in error. We fail to see that any right, title,

privilege or immunity of a Federal nature was specially set up or claimed. Very likely the construction and the effect of Federal statutes were, in a general way, discussed and considered, but nowhere do we find a special setting up or claiming of a Federal right which justifies us in taking jurisdiction."

In the case of California Oil and Gas Co. v. Miller, 96 Fed. 12, which was a case involving the title and right to the possession of the Southwest quarter of Section twenty, in township nineteen south of range fifteen, east, M. D. B. & M., (the land in controversy in this case being the Northeast quarter of said section twenty), Wellborn, J., said:

"Two things are necessary to the existence of a Federal question: First, an actual dispute between the parties as to the meaning of some law of the United States; second, materiality of the construction of such law to a determination of the cause. These two constituents have been succinctly stated thus:

" 'A cause is not removable simply because in its progress it may become necessary to construe or apply an act of Congress. Unless there is a dispute between the parties as to the meaning of the act, there is no Federal controversy between them. The decision of the case, or some material issue in it, must depend upon the construction of the act claimed by one party and denied by the other. A simple averment that such is the fact is stating a conclusion, and is not sufficient; the facts that show it to be true must be set out.' Fitzgerald v. Railway Co., 45 Fed. 812; State v. Chicago, M. & St. P. Ry. Co., 33 Fed. 394.

"See, also Water Co. v. Keyes, 96 U. S. 199; Giggs v. Crandall, 120 U. S. 106, 7 Sup. Ct. 497; Metcalf v. Watertown, 128 U. S. 589, 9 Sup. Ct. 173; City of New Orleans v. Benjamin, 153 U. S. 411, 14 Sup. Ct. Rep. 905.

"All except the last of the citations in this paragraph are cases of removal, but the requirements, so far as concerns the Federal question which authorizes a removal, are the same as those which confer original jurisdiction. Section 1 of each of three acts of congress below and in this paragraph named gives to the circuit courts of the United States 'original cognizance * * * of all suits of a civil nature * * * arising under the constitution or laws of the United States.' Section 2 of the act of congress of March 3, 1875, in one of its clauses (18 U. S. Stat. 470) provides for the removal of any suit 'arising under the constitution or laws of the United States.' The clause above referred to, as amended by the act of March 3, 1887 (24 U. S. Stat. 552), and corrected by the act of August 13, 1888 (25 U. S. Stat. 433), authorizes the removal of any suit 'of which the circuit courts of the United States are given original jurisdiction' by section 1 of said last named act, which section confers original jurisdiction upon the circuit courts 'of all suits * * * arising under the constitution or laws of the United States.' 25 U. S. Stat. 434. Where there is no dispute between the parties as to the meaning of any Federal law, but the case involves issues of fact solely,—as, for instance, which of two mining locations was first made, or whether or not the boundaries of either were marked upon the ground, or whether or not assessment work had been performed,—the case is not one arising under the constitution or a law or treaty of the United States, although the respective interests or titles of the parties may be derived through such constitution, law or treaty. Bushnell v. Smelting Co. 148 U. S. 682, 13 Sup. Ct. 771; Budzisz v. Steel Co., 170 U. S. 41, 18 Sup. Ct. 503; Theurkauf v. Ireland, 27 Fed. 769; Holland v. Hyde, 41 Fed. 897; Mining Co. v. Kinney, 46 Fed. 832; Mining Co. v. Woody, 50 Fed. 633; Argonaut

Min. Co. v. Kennedy Mining & Milling Co., 84 Fed. 1; King v. Lawson, Id. 209; Montana Ore-Purchasing Co. v. Boston & M. C. C. & S. Min. Co., 29 C. C. A. 462, 85 Fed. 867; St. Paul M. & M. Ry. Co. v. St. Paul & N. P. R. Co., 15 C. C. A. 167, 68 Fed. 2; Crystal Springs Land & Water Co. v. City of Los Angeles, 76 Fed. 148; Crystal Springs Land & Water Co. v. City of Los Angeles, 82 Fed. 114. In this last case the first paragraph of the syllabus is as follows:

"'When both parties claim under Mexican grants, confirmed and patented by the United States in accordance with the provisions of the treaty of Guadalupe Hidalgo, and the controversy is only as to what were the rights thus granted and confirmed, the suit is not one arising under said treaty, so as to confer jurisdiction on a federal court.'

"While some of the cases cited in the preceding paragraph were on writs of error to state courts, yet, in determining when there is a federal question, such cases are equally instructive with those originally brought in circuit courts. Railway v. Taylor, 86 Fed. 168."

In the leading case of Bushnell v. Crooke M. & S. Co., 148 U. S. 682, it appeared that the controversy in that case was with reference to certain locations upon mineral ground of the United States, and that after the final decision of the State court had been rendered, the record shows, that a petition for a rehearing was presented, for the first time attempting to raise a Federal question.

A motion to dismiss or affirm was made, and in speaking to this question the Court said:

"It is plainly manifest that neither the pleadings nor the instructions given and refused present any Federal question, and an examination of the decision of the supreme court affirming the action of the trial court as to instructions given, as

well as its refusal to give instructions asked by the defendants below fails to disclose the presence of any Federal question. It does not appear from the record that any right, privilege or immunity under the Constitution or laws of the United States was specially set up or claimed by the defendant below, or that any such right was denied them, or was even passed upon by the supreme court of the state, nor does it appear from anything disclosed in the record, that the necessary effect in law of the judgment was the denial of any right claimed under the laws of the United States.

"The decision of the supreme court of Colorado in no way brought into question the validity or even construction of any Federal statute and it certainly did not deny to the plaintiffs in error any right arising out of the construction of the Federal statutes. It was said by the Chief Justice, in Cook County v. Calumet & Canal & D. Co., 138 U. S. 635, 653 (34: 1110, 1116): 'The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed.'

"The attempt to raise for the first time a Federal question in a petition for rehearing, after judgment, even assuming that the petition presented any such question, is clearly too late. It has been repeatedly decided by this court that a Federal question, when suggested for the first time in a petition for rehearing after judgment, is not properly raised so as to authorize this court to review the decision of the highest court of the state. Texas & P. R. Co. v. Southern Pac. R. Co., 137 U. S. 48, 54, (34: 614, 617); Butler v. Gage, 138 U. S. 52 (34:869); Winona & St. P. R. Co. v. Plainview 143 U. S. 371 (36:191); Leeper v. Texas, 139 U. S. 462 (35:225)."

In support of both of the contentions, which we now make, attacking the jurisdiction of this court, to-wit:

(a) That the record fails to show that any Federal question was specially set or claimed, and decided adversely to plaintiff in error;

(b) That the decision of the State court rests upon an independent ground broad enough to sustain it without deciding any alleged Federal question;

we submit the following language of Justice Day in the case of Giles v. Teasley, 193 U. S. 146, 48 L. ed. 655:

"When the jurisdiction depends, as in the present cases, upon a right, privilege or immunity under the Constitution of the United States specially set up and denied in the state court, certain propositions, it is said by Mr. Chief Justice Fuller, speaking for the court in Sayward v. Denny, 185 U. S. 180-183, 39 L. ed. 941, 942, Sup. Ct. Rep. 777, are well settled; among others, 'The right on which the party relies must have been called to the attention of the court in some proper way, and the decision of the court must have been against the right claimed. Hoyt v. Shelden, 1 Black, 518, 17 L. ed. 65; Maxwell v. Newhold, 18 How. 511, 515, 15 L. ed. 506, 508. * * * Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly invoked so that the state court could not have given judgment without deciding it.' It is equally well settled that if the decision of a state court rests on an independent ground —one which does not necessarily include a determination of the Federal right claimed—or upon a ground broad enough to sustain it without deciding the Federal question raised, this court has no jurisdiction to review the judgment of the state court. New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; Eustis v. Bolles,

150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Dower v. Richards, 151 U. S. 658-666, 38 L. ed. 305-308, 14 Sup. Ct. Rep. 452; Wade v. Lawder, 165 U. S. 624-628, 41 L. ed. 851, 17 Sup. Ct. Rep. 425.

"In every case which comes to this court on writ of error or appeal the question of jurisdiction must first be answered, whether propounded by counsel or not. Defiance Waterworks v. Defiance, 191 U. S. 184, 24 Sup. Ct. Rep. 63."

Upon this branch of the case we respectfully submit that the record presented for the consideration of this court upon this writ of error fails to disclose that a Federal question was set up or claimed by the plaintiffs in error at any state of the proceedings in the trial court or the appellate court, and, as the record does not affirmatively disclose the jurisdiction of this court, under the uniform rule established by the decisions of this court, we respectfully ask that the writ of error be dismissed.

2. The court below decided the case upon an independent, non-Federal, ground, broad enough to support the judgment.

As has been stated, this is an action to quiet title to the Northeast quarter of Section 20, Township 19 South, Range 15 East, M. D. B. & M., all the parties claiming title and right to possession by virtue of locations made under the mineral laws of the United States (p. 121).

The trial court, among other things, found that E. O. Miller was the owner of the property (p. 21), and that the Home Oil Company was the lessee of the property claiming title under the plaintiff, E. O. Miller, and "*at the commencement of this action was, ever since has been, and is now in the actual possession of the same and of every part thereof*"; that the

plaintiffs in error claim an estate or interest, adverse to the plaintiffs, in and to a part of the land, but that their alleged claims are without right (p. 22). That on December 31, 1896, the property described was a part of the public domain of the United States, open to location for mining purposes under the laws of the United States (p. 22). That on the 31st day of December, 1896, E. O. Miller and his co-locators, eight in all, each of them being a citizen of the United States, located said 160 acres under the laws of the United States, and did mark their claim on the land so that the boundaries thereof could be readily traced (p. 23). That on the 31st day of July, 1897, all of the co-locators of E. O. Miller granted and conveyed to the plaintiff, E. O. Miller, all their right, title and interest in and to said quarter section; and on the 17th day of September, 1897, the latter made a lease unto one, Frank Barrett of the property in controversy, and that the lessee went into possession of the property by virtue of the terms of said lease, and on the same day, for a valuable consideration, assigned his lease to The Home Oil Company, and that The Home Oil Company thereupon, went into the immediate possession of all of said property under and by virtue of said lease, "*and ever since has been, and now is, in the exclusive possession of all of the same and every part thereof*" (p. 23). That thereafter, the lessee commenced the development of said property and expended more than $30,000 for that purpose, and as a result discovered large quantities of petroleum therein, and that at the commencement of said action, there existed wells of great depth upon said premises, sunk and excavated by The Home Oil Company from which there is a daily flow of large quantities of petroleum of great value (p. 24). That ever since September 17th, 1897, the defendant in error, the Home

Oil Company, *"has been and now is in the sole and exclusive possession of all of said property and engaged in working, developing and mining the same and extracting petroleum and other fluid products therefrom."* That on the 1st day of January, 1897, the defendant, A. Y. Chrisman, a citizen of the United States, entered upon a portion of said premises and posted a notice of location, that he claimed 20 acres thereof for mining purposes, and that the boundaries thereof were marked so as to be readily traced (p. 24). That on the same day, H. T. Chrisman, a citizen of the United States, did enter upon the possession of a part of said premises and did post a notice of location that he claimed 20 acres thereof for mining purposes, and that the boundaries of said 20 acres were marked so that they could be readily traced (p. 25).

The court further finds, upon abundant evidence, the following facts:

"That said defendant, A. Y. Chrisman, never at any time discovered a seepage of petroleum or other mineral oil upon said land or any part thereof, and the defendant H. T. Chrisman never discovered a seepage of petroleum or other mineral oil upon said land or upon any part thereof, and that the only discovery of petroleum or any other fluid product upon said lands, or upon any part thereof, is the discovery made by the plaintiff, Home Oil Company as in these findings before stated" (p. 25).

In addition to the foregoing the court finds: That when said locations of the plaintiffs in error were made, that no part of said quarter section was vacant, but on the contrary, the whole of the same was then in the possession of E. O. Miller and his co-locators; that the plaintiffs in error did not make their locations in good faith, and that they never did or performed any work or labor thereon as required by the laws of the United States or the State of California (p. 25).

The court found numerous other findings of fact relating to other issues presented by their pleadings, but which are not material to the points now under discussion.

The Supreme Court in its opinion (pp. 121-27), after deciding that the Barieau location was invalid for the reason that no discovery of mineral was made thereunder, proceeds:

"Thus having been determined that the initiation of the claim of Miller and his associates was founded in the right, there remains to be considered the objection urged against the validity of that location. And first it is insisted that the location is invalid because Miller, prior to his location, but upon the same day, executed an abandonment to the Government of all rights under the Barieau location, and it is contended that this invalidated the location subsequently made, because such pretended abandonment was not made in good faith, but was designed as a fraud upon the United States to evade the performance of the assessment work required by law. But the answer to this is that the court, upon sufficient evidence, finds against this contention, and, furthermore, as the Barieau location was itself invalid, there was no occasion for an abandonment of it, because there was nothing to abandon. As to the other objections made to the validity of the Miller location, it is sufficient to say, without discussing the evidence, that the court was justified in its finding that the requirements of the posting of a sufficient notice and demarkation of boundaries were all complied with in accordance with law. So, too, the evidence warrants the finding of the court that the persons named as co-locators in the Miller location were *bona fide* locators, and that the location was made for the benefit of them all. Likewise, upon sufficient evidence, the court's finding negatives the charge of fraud, collusion and conspiracy upon the part of these locators.

"It is disclosed by the evidence that Miller, his associates and lessees remained in possession of the land, and with diligence and great expense prosecuted the work of boring wells. This work finally resulted in success, oil was discovered in paying quantities, and the land became extremely valuable. Plaintiffs thus, not only made a discovery, but are the ones of all of the alleged locators who have done so. It has been said that it is not necessary that discovery should precede nor coexist with the posting of notice and the marking of the claim, but that a discovery subsequently made perfects the title except so far as the rights of others may have intervened. This proposition is perhaps too well recognized to require citation of authorities, but reference may be made to 1 Lindley on Mines, sec. 330; Jupiter M. Co. v. Bodie C. M. Co. 11 Fed. Rep. 666; North Noonday M. Co. v. Orient M. Co. 1 Fed. Rep. 522; Thompson v. Spray, 72 Cal. 528; Erwin v. Perigo, 93 Fed. Rep. 608; Erhardt v. Boaro, 113 U. S. 527; English v. Johnson, 17 Cal. 108. * * * * It appears that Miller, his co-locators and other successors in interest, remained in the actual and undisturbed possession of the entire property from the date of their location until the commencement of this action."

It thus appears from the findings of the trial court and the decision of the Supreme Court, sought to be reviewed in this proceeding, that on the 31st day of December 1896 the land in controversy was open to location; that on that day a notice of location was posted by E. O. Miller and his seven associates as an association, and that the boundaries of their claim were marked so that they could be readily traced; that thereafter, and before any intervening rights accrued, a discovery of oil was made under that location, and since December 31st, 1896, the defendant in error, E. O. Miller, and The

Home Oil Company, as his lessee, have been in the sole, exclusive, personal and peaceable occupation and possession of all of said premises, developing the same, and have expended large sums of money thereon, and have discovered large quantities of petroleum therein, and the land has become exceedingly valuable. That plaintiffs in error intruded upon the possession of the defendants in error for the purpose of making their alleged locations, but they had never performed any work thereunder for assessment purposes, or otherwise, and that neither one of them has ever made any discovery of mineral within the boundaries of their alleged claims.

The alleged locations of plaintiffs in error were made shortly after midnight (pp. 78, 80).

Under such a state of facts our contention is that the decision of the Supreme Court of the State of California upon those questions is determinative of the rights of the parties and is broad enough to support its decision without reference to other grounds.

It has been uniformly held that questions of fact, when once settled in the courts of a state, are not subject to review in this court.

W. U. T. Co. v. Call Pub. Co., 181 U. S. 92.
Gardner v. Bonestill, 180 U. S. 362.

In the late case of Clipper Min. Co. v. Eli Min. & L. Co., 194 U. S. 220, the following language is used:

"It is the settled rule that this court, in an action at law, at least, has no jurisdiction to review the conclusions of the highest court of a state upon questions of fact. Republican River Bridge Co. v. Kansas P. R. Co. 92 U. S. 315, 23 L. ed. 515; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; Israel v. Arthur, 152 U. S. 355, 38 L. ed. 474, 14 Sup. Ct. Rep. 583; Noble v. Mitchell, 164 U. S. 367, 41

L. ed. 472, 17 Sup. Ct. Rep. 110; Hedrick v. Atchison T. & S. F. R. Co., 167 U. S. 673-677, 42 L. ed. 320, 321, 17 Sup. Ct. Rep. 922; Turner v. New York, 168 U. S. 90-95, 42 L. ed. 392-394, 18 Sup. Ct. Rep. 38; Egan v. Hart, 165 U. S., 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300. It must, therefore, be accepted that the Searl placer claim was duly located, that the annual labor required by law had been performed up to the time of the litigation, that there was a subsisting valid placer location, and that the lodes were discovered by their locators within the boundaries of the placer claim subsequently to its location. So the trial court specifically found, and its finding was approved by the supreme court."

If the decision of a Federal question in a state court is rendered unnecessary by the view which that court properly takes of the rest of the case within the scope of its pleadings, the judgment is not open to review in the Supreme Court of the United States.

Chapman v. Goodnow, 123 U. S. 540.

Wells v. Goodnow, 150 U. S. 84.

Where the state court disposes of the case upon non-Federal grounds sufficient to support its judgment, it is obvious that the Supreme Court of the United States cannot review such judgment on the theory that a decision of a Federal question was necessarily involved.

McManus v. O'Sullivan, 91 U. S. 578.

Crossley v. New Orleans, 108 U. S. 105.

N. Y. C. & A. R. R. Co. v. N. Y. 186 U. S. 269.

The foregoing rule is true even though the Supreme Court of the United States may think the position of the state court an unsound one.

Klinger v. Missouri, 13 Wall. 257.

De Saussure v. Gaillard, 27 U. S. 216.

In inquiring whether jurisdiction to review a decree of a state court may be declined because such decree may be sustainable on an independent non-Federal ground the Supreme Court of the United States considers only the final action of the highest court of a state in disposing of the controversy, and is not concerned with the conclusions of the trial court or of the department of such highest court.

Allen v. S. P. R. Co. 173 U. S. 479.

The principle which we are now affirming is clearly stated in Bacon v. Texas, 163 U. S. 207, as follows:

"But where there are two grounds for the judgment of the state court, only one of which involves a Federal question, and the other is broad enough to maintain the judgment sought to be reviewed, it is now settled that this court will not look into the Federal question, inasmuch as there is another ground upon which the judgment can rest, and it will dismiss the writ for that reason. Eustis v. Bolles, 150 U. S., 361. In the course of the opinion in that case, which was delivered by Mr. Justice Shiras, the case of Beaupre v. Noyes, 138 U. S. 397, 401, is cited and the opinion of the latter case contains the following statement: 'Whether the state court so interpreted the territorial statute as to deny such writ to plaintiffs in error, we need not inquire, for it proceeds in part with another and distinct ground, not involving a Federal question, and sufficient in itself to maintain the judgment, without reference to that question.' The opinion after stating what that ground was, thus continues: 'That view does not involve a Federal question. Whether sound or not, we do not inquire. It is broad enough in itself to support the final judgment, without reference to the Federal question.'

"In Rutland Railroad v. Central Vermont Railroad, 159 U. S. 630, it is stated, 'that where a state court, in rendering

a judgment decides a Federal question, and also decides against the plaintiff in error upon an independent ground, not involving a Federal question, and broad enough to support the judgment, this court will dismiss the writ of error without considering the Federal question.' To same effect are Gillis v. Stinchfield, 159 U. S. 658, 660; and Seneca Nation of Indians v. Christy, 162 U. S. 283."

In the case of Harrison v. Morton, 171 U. S., 38, it is said:

"The supreme court, it is true, passed on other grounds, passed on the one which it is claimed involved a Federal question and decided adversely to plaintiff. But the rule in such cases has been repeatedly declared by this court. It is not necessary to review the decisions. That has been done by Mr. Justice Shiras in Eustis v. Bolles, 150 U. S., 361. It is sufficient to announce the rule pronounced in that case:

" 'It is settled law that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming the right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. Murdock v. Memphis, 20 Wall. 590; Cook County v. Calumet & Chicago Canal Co. 138 U. S. 635.

" 'It is likewise settled law that where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the

Federal question, to sustain the judgment, this court will not review the judgment.' See also Wade v. Lawder, 165 U. S. 624."

In the case of McQuade v. Trenton, 172 U. S., 636, it is said:

"We have repeatedly held that even the decision by the state court of a Federal question will not sustain the jurisdiction of this court, if another question, not Federal, were also raised and decided against the plaintiff in error, and the decision thereof be sufficient notwithstanding the Federal question, to sustain the judgment."

In Seeberger v. McCormick, 175 U. S. 274, this Court said:

"It has been frequently held that the contention, even if formally made, that the plaintiffs in error were seeking to avail themselves of some right or immunity under the Constitution or laws of the United States does not give us jurisdiction to review the judgment of the Supreme Court of a State where that judgment was based upon a doctrine of general law sufficient of itself to determine the case. Beaupre v. Noyes, 138 U. S., 397; Eustis v. Bolles, 150 U. S. 361, Pierce v. Somerset Railway, 171 U. S., 641; Remington Paper Co. v. Watson, 173 U. S., 443."

The trial court found the following facts in this case:

1. *That neither of the plaintiffs in error ever made any discovery of mineral within the boundaries of their respective claims.* (p. 25.)

2. *That when they attempted to make their locations, the land was in the actual occupancy and possession of the defendants in error.* (p. 25).

3. *That the defendants in error were likewise in the actual occupancy and possession of the premises in controversy*

at the time of the commencement of their action against the plaintiffs in error. (p. 22).

These findings were approved by the decision of the supreme court sought to be reviewed herein, and in our opinion are determinative of this case upon this hearing.

As we understand it, these findings of fact must be taken as true upon this hearing, and being true, the plaintiffs in error were mere naked trespassers, and the possessory title of the defendants in error was alone sufficient to support the final judgment in their favor.

In the case of Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 732, it was stated:

"Unless some reason is shown not found in this record these were the persons entitled to make pre-emption, and no one else. But suppose they were not. Does the policy of the pre-emption law authorize a stranger to thrust these men out of their homes, seize their improvements, and settle exactly where they settled, and by these acts require the initiatory right of pre-emption? The generosity by which Congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling did not mean to seize some other man's dwelling. It had reference to vacant land, to unimproved land; and it would have shocked the moral sense of the men who passed these laws, if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homi-

cides and other crimes of less turpitude." * * * * "It follows that the defendants could not have made any lawful entry on the lands where the hay was cut in this case; that no law existed which gave them any right to make such an entry; that they were *mere naked trespassers*, making an unwarranted intrusion upon the enclosure of another; an enclosure and occupation of years, on which time, and labor and money had been expended; and that in such a wrongful attempt to seize the fruits of other men's labor there could be no bona fide claim of right whatever. The instruction of the court that this could be done, founded on an erroneous view of the pre-emption law, was itself erroneous and the judgment founded on it must be reversed."

This rule is quoted with approval by Judge Ross in the case of the Sierra-Nevada Oil Co. v. Home Oil Company, 98 Fed. 673, as the very question presented in this record, came before Judge Ross for decision. By an examination of the case just referred to, it will be seen that the plaintiff in the action contested the validity of the precise location under which the defendants in error claim and sought to recover this territory under two locations, the latter of which was made by one Jackson on the 26th day of May, 1898.

The record there showed that the defendants were at the time of the Jackson location, as in this, in the actual possession of the claim in controversy and actually engaged in mining it for oil, and Judge Ross held in that case as follows:

"It is true that upon mineral land of the United States upon which there is no valid existing location any competent locator may enter, even if it is in the actual possession of another, provided he can do so peaceably and in good faith, in order to initiate a location for himself; but no right upon any government land, whether mineral or agricultural, which

is in the actual possession of another, can be initiated by a forcible, fraudulent, surreptitious, or clandestine entry thereon. Such entry must be open and above board and made in good faith. Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735; Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 372. One who is in the actual possession of a mining claim, working it for the mineral it contains, and claiming it under the laws of the United States, whether the location under which he so claims is valid or invalid, cannot be forcibly, surreptitiously, clandestinely, or otherwise fraudulently intruded upon or ousted while he is asleep in his cabin, or temporarily absent from his cabin. I think it clear from the showing made upon the hearing of this application: First, that Jackson did not make any such open and good faith entry upon the actual possession of the defendants of the quarter section in question, upon which he could initiate any valid location thereof under the mining laws."

In the case of Cowell v. Lammers, 21 Fed. 200, it appeared that one McCarty, the manager of the plaintiff, was in the actual possession and occupation of certain land having it under fence and in actual use; that the defendant, by permission of the plaintiff, had erected a cabin on a portion of the lands of the plaintiff other than that part upon which the trespass is alleged to have been committed. That thereafter, the defendant, without the consent and against the will of plaintiff, entered upon the portion involved in the action, assuming it to be public mineral land, and located a mining claim thereon. It will be seen that there was no force or fraud of any kind exercised, but that the mining location was made against the will and without the consent of the plaintiff.

In discussing the question the Court says:

"The complainant insists that, in view of the indisputable

facts appearing in the case, the defendant is not in a position which entitles him, in this proceeding to collaterally assail the validity of his title under the patent for two reasons; and, if I rightly comprehend the decisions of the Supreme Court upon similar questions, he is clearly right in this position. In Atherton v. Fowler the Supreme Court distinctly held that no right of pre-emption can be established by a settlement and improvement on a tract of land conceded to the public, where the pre-emption claimant intruded upon the actual possession of another, who, having no other valid title than possession, had already settled upon, inclosed, and improved the tract, that such an intrusion is but a naked, unlawful trespass, and cannot initiate a right of pre-emption. (96 U. S. 513). This decision was affirmed in Hosmer v. Wallace, 97 U. S. 759, and Quinby v. Conlan, 104 U. S. 421. In the latter case the court says: 'A settlement cannot be made upon land already occupied; as against existing occupants, the settlement of another is ineffectual to establish a pre-emption right. Such is the purport of our decisions in Atherton v. Fowler, 96 U. S. 513, and Hosmer v. Wallace, 97 U. S. 575; 104 U. S. 423. The laws no more authorize a trespass upon the actual possession and occupation of another, for the purpose of initiating a pre-emption right to take up and acquire under the statutes the title to a piece of mineral land, than to initiate an ordinary pre-emption right to a tract of agricultural land. The law does not encourage or permit, for any purpose, unlawful intrusions and trespasses upon the actual possession and occupation of another. To permit a right or confer authority to thus initiate a title to the public land, would be to encourage strife, breaches of the peace, and violence of such a character as to greatly disturb the public tranquility. We are, fortunately, not without painful examples of this

kind in this state. Actual possession and occupation of lands in good faith, public or otherwise, have always, as against naked trespassers, been regarded as evidence of title, and fully protected by the courts of this state from its first settlement. In this case the defendant intruded upon the actual possession and occupation of the complainant, prospected for and located a supposed mine upon lands which had been inclosed with a substantial fence and in the actual possession, occupation, and use of the complainant and his immediate grantor for eight years, claiming title under a patent of the United States, regularly issued fourteen years before. He is a mere stranger and trespasser upon the actual possession and occupation of the complainant, without any right recognized by the law of the land, and is not in a position to assail the complainant's title. If this is not the rule established by the decisions of the Supreme Court, then I am unable to comprehend their import. See also Doll v. Meador, 16 Cal. 320, et seq."

In the case of Crossman v. Pendery, 8 Fed. 693, it appeared that the case was submitted upon an agreed state of facts to the effect that the ground in controversy was covered by two locations, both regular in form. That the Orion claim was first surveyed, located and staked, and that the locators had steadily prosecuted work in the development thereof, and had discovered mineral in several places. That the other location was made subsequent to the Orion and while the locators of the latter were in possession thereof, and that under the second location mineral was discovered and before the discovery of the locator of the Orion.

Justice Miller, after stating the facts, proceeds:

"The question submitted to the court is this: Can prospect-

ors on the public mineral domain acquire any right in which the law will protect them prior to the discovery of mineral in rock in place? And, if so, can plaintiffs, being prior locators, recover against defendants, who first discovered mineral on the ground in controversy? It is the opinion of the Court that inasmuch as the plaintiffs allowed defendants to enter upon their claim and within their boundaries and there sink a shaft, in which they discovered mineral in rock in place before a discovery by plaintiffs, and made location thereof, without protest, the defendants now have a better right. But the plaintiffs might have protected their actual possession of their entire claim by proper legal proceedings prior to the discovery by the defendants, or by either party. A prospector on the public mineral domain may protect himself in the possession of his pedis possession while he is searching for mineral. His possession so held is good as a possessory title against all the world, except the Government of the United States. But if he stands by and allows others to enter upon his claim and first discover mineral in rock in place, the law gives such discoverer a title to the mineral first discovered, against which a mere possession of surface cannot prevail, and in this case judgment must be for the defendants."

In the very late case of Tarpey v. Madsen, 178 U. S. 215, 44 L. ed. 1042, Justice Brewer said:

"It must be remembered that mere occupation of the public lands gives no right as against the government. It is a matter of common knowledge that many go over the public domain, build cabins and establish themselves temporarily, at least as occupants. * * * Such occupation is often accompanied by buildings and enclosures for housing and care of stock. * * * These occupants are not in the eye of the law con-

sidered as technically trespassers. No individual can interfere with their possession or compel them to leave. Their possessory rights are recognized as of value and may be subjects of barter and sale. * * * In this respect we must notice the oft-repeated declaration of this Court, that 'the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereof.' Ard. v. Brandon, 156 U. S. 537, 543, 39 L. ed. 523, 526, 15 Sup. Ct. Rep. 406; Northern P. R. Co. v. Amacker, 175 U. S. 564, 567, *ante* 274, 275, 20 Sup. Ct. Rep. 236."

In the case of Pacific L. & I. Co. v. Elwood Oil Co. 112 Fed. 4, Judge Hawley, of the United States Circuit Court of Appeals, said:

"The contention of appellant would, if its doctrines were to prevail, lead to results which are denounced in Atherton v. Fowler, 96 U. S. 513, 513, as being antagonistic to the true intent and meaning of the pre-emption laws. In that case it was held that the right to make a settlement is only to be exercised on unsettled lands; that the right to make improvements is to be exercised on unimproved lands; that the right to erect a dwelling house is to be exercised only on vacant land, and that none of these things can be done on land when it is occupied and used by others.

"No right can be initiated on government land which is in the actual possession of another by forcible, fraudulent or clandestine entry thereon. Cowell v. Lammers, 21 Fed. 200, 202; Nevada-Sierra Oil Co. v. Home Oil Co., 98 Fed. 674, 680; Hosmer v. Wallace, 97 U. S. 575, 579; Tremouth v. San Francisco, 100 U. S. 251; Mower v. Fletcher, 166 U. S. 380, 385-6; Haws v. Victoria Copper M. Co. 160 U. S. 303, 317; Nickals v. Winn, 17 Nev. 188, 193; McBrown v. Morris, 59

Cal. 64, 72; Goodwin v. McCabe, 75 Cal. 584, 588; Rourke v. McNally, 98 Cal. 291.

"The decisions upon this point are not all confined to cases where the entry is forcible, although in such cases the courts did not discuss the question whether the same principles would apply to cases of an entry upon lands in the actual possession of another, without the use of force.

"In Quinby v. Conlan, 104 U. S. 420, 423, the element of force is not shown to have existed and it is not adverted to in the opinion. The Court said: 'A settlement cannot be made upon public land already occupied; as against existing occupants, the settlement of another is ineffectual to establish a pre-emptive right. Such is the purport of our decision in Atherton v. Fowler, 96 U. S. 513, and Hosmer v. Wallace, 79 id. 575.'

"In Goodwin v. McCabe, *supra*, the Court said: 'If the plaintiff was in the actual possession of the land, we think the defendant's proceedings were invalid, although his entry was accomplished without the use of force. This seems to be the result of the authorities. * * * The reasoning of the court in all cases seems to us to forbid the invasion of the actual possession of another, whether such invasion is accomplished by the use of force or not.'

"In Gird v. California Oil Co., 60 Fed. 531, 545, this principle is recognized. The Court said: 'If Irland was in the actual possession, and working the ground for himself, and Barfield, Henley and Thompson were acting for themselves in making the location of the Razzle Dazzle on December 6, 1890, the location so made by them would be void, because in that event, the location would have been made upon ground not vacant, and open to location, but upon ground in the actual and adverse occupancy of another.'

"Having arrived at the conclusion, from the facts stated in the bill of complaint and the principles of law applicable thereto, that the lands selected by the grantor of appellant were not, at the time of such selection, 'vacant land open to settlement,' it is unnecessary to review the many other questions which were elaborately argued by the learned counsel.

"It necessarily follows, from the views we have expressed, that the bill of complaint does not state any cause of action entitling appellant to any relief against the defendants. The Court did not, therefore, err in sustaining the demurrer and dismissing the bill."

The same rule has been established by various decisions of our state Court. In the case of Davis v. Scott, 56 Cal. 165, the syllabus is as follows:

"The right of pre-emption under the laws of the United States cannot be acquired by intrusion and trespass upon lands in the actual possession of others. The Justice, Morrison, in referring to the case of Atherton v. Fowler, *supra*, quotes the decision of Justice Miller with approval, saying, among other things, 'The defendant, having made an ineffectual attempt to pre-empt the land in controversy, invaded the plaintiff's possession, and now withholds the possession from him. It is impossible for us to perceive any just claim or right which the defendant can assert in support of his entry. He did not have a pre-emption claim to the land, or to any portion thereof, and could not, under the highest authority of law, become a pre-emptioner thereof. The land was in the actual possession and occupation of the plaintiff at the time the defendant attempted to locate a pre-emption claim thereon, and it was not, therefore, subject to pre-emption.' "

A later case is that of McBrown v. Morris, 59 Cal. 64. The opinion was written by Thornton, and concurred in by Mc-

Kinstry and Ross, and reaffirms the case of Atherton against Fowler, and other decisions of this state and of the United States. It appeared in that case that at the time of the entry complained of, the plaintiff was in actual possession of the land, and used the same for dairy and other purposes, and that the main question presented was whether the defendant could initiate a right by entering and settling upon the land within the inclosure of and occupancy and possession of another without his consent and against his express prohibition.

In part, Judge Thornton says:

"The right to make a settlement was to be exercised on unsettled land, and to make improvements on unimproved land. * * * It would have shocked the moral sense of the men who passed these laws if they had supposed that they had extended an invitation to the pioneer population to acquire any inchoate rights to the public land by trespass. That the entry of defendant as expressly found was made without the consent of plaintiff, or his tenants, and against their wish, and he was forbidden to make such entry by them. The findings of fact bring this case within the determination of the cases cited. * * * That such an intrusion, though made under pretense of pre-empting the lands is but an unlawful trespass and cannot initiate a right of pre-emption."

In the case of Rourke v. McNally, 98 Cal. 291, the court says:

"Since she entered into the actual possession of another, it is no moment that her entry was peaceable, because made in the presence of plaintiff. * * * Until she has acquired some such right or connected herself in some lawful mode with the true title, she cannot resist the presumption of title in the plaintiff which arises from the fact of his prior pos-

session. The laws of the United States do not authorize an entry upon the actual possession of another for the purpose of making a settlement, though made by one qualified to purchase from the government to acquire such a homestead, although such entry is made with the intent to acquire the title in some lawful mode. (Atherton v. Fowler, 96 U. S. 513; Dunwood v. Martin, 120 U. S. 369; Quinby v. Conol, 104 U. S. 381; McBrown v. Morris, 59 Cal. 68; Goodwin v. McCabe, 75 Cal. 584; Bullock v. Rouse, 81 Cal. 590; Peterson v. Kinkead, 92 Cal. 372.)"

In the case of McGuire v. Brown, 106 Cal. 660, it is said:

"Our conclusion is supported by analogy also with the rule for many years enforced both in the federal courts and the courts of this state, that the right of property which the laws of Congress allow to be acquired on the public domain shall not be initiated by trespass and intrusion on the actual possession of a prior occupant. (McBrown v. Morris, 59 Cal. 64; Goodwin v. McCabe, 75 Cal. 588, and cases cited.)"

In the case of Phenix M. & M. Co. v. Lawrence, 55 Cal. 143, it is said:

"The only issuable question was really the intention with which the defendants entered. They claimed in their answer that they entered in good faith, believing that the ground was vacant, and subject to location according to the mining laws. But a person who knows that a mining claim is in the actual possession of another cannot honestly believe that it is vacant, and subject to entry and relocation; and the entry under such circumstances cannot be made in good faith, unless it is made upon some right, or color of right, or claim of legal right, to make the entry. Such a claim of right must exist before the entry, to constitute good faith in making the

entry. If it does not exist, the entry is made without right or color of title, and is an entry in bad faith; for actual possession in another is prima facie evidence of title in the possessor, and is protected by the law against lawless invasion without right or color of right." * * *

"But the defendants offer no evidence of right or title. They knew that the mine was in the possession of the plaintiff and that half a million of dollars had been expended on it; and they admit that they entered upon it, not upon the faith of any title or right in themselves, but to take advantage of what they supposed to be a defect in the title of plaintiff. * * * It is apparent that the defendants, by their own testimony, did not enter upon the mine under any title or claim of right which they had to the mine. They entered only because they believed or suspected, that the plaintiff's claim of title was defective. After their entry without right or color of title, they went through the forms of making a location, and posted a notice thereon, which they caused to be filed in the Recorder's office of the district."

In the early case of Attwood v. Fricot, 17 Cal. 43, the Court says:

"We are inclined to think that some of the instructions given at the instance of the defendant, whether correct or not, as abstract propositions applicable to real estate, had a tendency to mislead the jury when applied to the facts of the record. Mining claims are held by possession, but that possession is regulated and defined by usage and local, conventional rules, and the 'actual possession' which is applied to agricultural lands, and which is understood to be a *possessio pedis*, can scarcely be acquired in a mining claim in order to give a right of action for the invasion of it. The claim must

be in some way defined as to limits, of course, before the possession of or working upon part gives possession to any more than that part so possessed or worked. But when the claim is defined, and the party enters in pursuance of the mining rules and customs, the possession of part is the possession of the entire claim. And so if a party enters bona fide under color of a title, as under a deed or lease, the possession of a part against any one but the true owner or prior occupant is the possession of the entire claim described by the paper; and this though the paper did not convey the title. The condition of the possessor, in such instances, would not be worse than that of the occupant of other real estate, in which case the rule applies. A third person would have no right to invade the possession of the party taking it under such circumstances, and set up, as against him, outstanding title in a stranger, with which he had no connection. This principle does not touch the case of an entry into possession in pursuance of mining rules and regulations, as for a forfeiture or abandonment, etc.; but the case we suppose is of a possession taken independently of such rules."

Again, in the great case of English v. Johnson, 17 Cal. p. 108, which is more largely cited, perhaps, than any other case in the books, upon this subject, the Court takes occasion to say:

"The Court charged the jury, in effect, that possession taken, without reference to mining rules, of a mining claim was sufficient, as against one entering by no better title, to maintain an action; and further, that this possession need not be further evidenced by actual inclosures, but 'if the ground was included within distinct, visible, and notorious boundaries, and if the plaintiffs were working a portion of the ground within those boundaries,' this was enough as against any one entering with-

out title. We see no objection to this ruling. In the late cases of Atwood v. Fricot, et al., *ante* 37, we lay down some rules on this general subject. The taking up of mineral land in pursuance of the mining regulations of the vicinage gives possessory title to the claims, just as an entry in the land office, or the following of prescribed rules given by statute, gives a possessory title to public or agricultural land. But it does not follow, because this is the regular or usual way of obtaining possession, that a possession not so obtained would necessarily be without the protection of the law. Possession not taken in pursuance of these rules would still be good as against one not taking possession in accordance with the rules of the vicinage, but merely coming upon the premises in the same manner as the prior possessor. The actual prior possession of the first occupant would be better than the subsequent possession of the last.

"The question arises as to the extent of the possession of the first taker, and the rules which determine this question. In mining claims we require no other acts, as evidence of possession, than those usually exercised by the owners of such claims. A miner is not expected to reside upon his claim, nor to build upon it, nor to cultivate the ground, nor to inclose it. The claim is usually of a small strip of land compared with the extent of ground generally taken up for agricultural purposes. Its only value is in working it and extracting minerals. A party may be in possession by himself, or by his agents or servants. Going on the land to work it, or even work done in proximity and in direct relation to the claim, for the purpose of extracting, or preparing to extract minerals from it—as, for example, starting a tunnel a considerable distance off to run into the claim—would be a possession of the claim within the

meaning of the rule. If, as was held in the case of Attwood v. Fricot, et al., the party entered under written claim or color of title, his possession except as against the true owner or a prior occupant, would be good to the extent of the whole limits described in the paper, though the possession be only of a part of the claim. In this case, it seems the plaintiffs took up, in connection with others, these claims sued for, marking and defining, in the way usual among miners, the limits; and also bought out the interest of two of their associates, original appropriators. But we think where a claim is distinctly defined by physical marks, that possession taken for mining purposes embraces the whole claim thus characterized, though the actual occupancy or work done be only upon, or of a part, and though the party does not enter in accordance with mining rules, or under paper title. The rule which applies to agricultural land, and holds to a more strict interpretation of a *possessio pedis*, does not apply to such a case. Inclosure, if not impossible, besides being probably hurtful to other interests and rights, would be wholly useless. It would give no greater or better advertisement of the extent of the claim than those physical signs, nor give any better protection to the premises against intrusion, or show any higher power of dominion."

Again, in the case of the Table Mt. Tunnel Co. v. Stranahan, 20 Cal. 198. (We quote from the syllabus):

"Possession of mining ground, acquired by an entry under a claim for mining purposes, upon a tract the bounds of which are distinctly defined by physical marks, accompanied with actual occupancy of a part of the tract, is sufficient to enable the possessor to maintain ejectment for the entire claim, al-

though such acts of appropriation are not done in accordance with any local mining rule."

Applying these principles of law to the facts in this case, as determined by the courts of the State of California, we are of the opinion that our contention upon this branch of the case should be sustained, and that this court should determine, as a matter of law, that the decision of the supreme court of the state of California is based upon grounds, non federal in character, sufficient to support its judgment.

MOTION TO AFFIRM.

Assuming that the record may show that this court has jurisdiction, it is manifest that this writ of error was taken for delay only, and that the question upon which the jurisdiction depends is so frivolous as to need no further argument.

The judgment sought to be reviewed discusses the various contentions made by the different parties in interest and decides them, *seriatim*, in favor of these defendants in error. In the course of the decision it is stated:

"Defendants and intervenor make common cause upon most of the matters presented upon appeal.

"Their contentions are:

"1. That the location by Barieau and others upon the 14th of June, 1895, was a valid location which divested the land of its status as part of the public domain, and appropriated it to private claim and domain until the end of the year, 1896.

"2. That, therefore, Miller's attempted location upon December 31st, 1896, was void because made at a time when there was a valid subsisting location upon the land; because it was not based on a discovery and was not perfected by a subsequent discovery until the rights of other parties attached; because the location was in fact made only by Miller, Hall and Hannah, the other five co-locators being mere dummies, and, finally, because the boundaries of the location were not marked upon the ground so that they could be readily traced.

"3. That no assessment work whatsoever having been done upon the land in question during the year 1896, by or on behalf of Barieau and his co-locators, the Barieau location lapsed,

and on the first day of January, 1897, the land again became open for exploration and location, and was so open at the time that defendants made their locations upon January 1, 1897; that their locations were and at all times have been, valid subsisting locations" (pp. 121-122).

The decision then proceeds to discuss these contentions. As to the Barieau location, the court says:—

"It will thus be noted that none of the appellants claim under the Barieau location, nor contend that they have acquired any of the rights of those locators. It is agreed that if the Barieau location was in all other respects a valid location, it lapsed at the end of the year 1896 by failure to perform the statutory amount of labor. If, however, the Barieau location was not a valid location, *as the court finds*, (Italics ours), then the lands were open to notorious, peaceable, and *bona fide* entry by others for the purpose of initiating a new location. The findings of the court, as has been said, were against the validity of the Barieau location.

"Without discussing other grounds of objection made to that location, we are satisfied that it was invalid for at least one reason. Barieau and his co-locators did not at the time of their attempted location, nor ever, make any discovery of mineral upon the land" (p. 122).

Upon the second point the court determines that Miller's location on December 31st, 1896, was valid, and was not made at a time when there was any valid, subsisting location upon the land, but, on the contrary, that it was vacant and unoccupied at the time of his location; that it was based upon the actual discovery of oil, and that the claim was located and oil actually discovered before the rights of any of the parties attached, and that the other five co-locators of Miller, et al., were not dummies, and that the boundaries of the claim were dis-

tinctly marked upon the ground. In other words, upon the facts found by the lower court, upon sufficient evidence, the appellate court found each of the contentions set forth in subdivision 2 adverse to the position taken by these plaintiffs in error (p. 124). As to the question presented in subdivision 3 the court found, which finding was approved by the appellate court, that there never was a Barieau location, but that it was invalid from its inception, and that the land was not open for exploration or location on January 1st, 1897, at a time when these plaintiffs in error attempted to make their alleged locations.

The solution of all of the foregoing questions depends upon the determination of questions of fact alone. The facts being found, the principles of law applicable to them are perfectly well settled and ascertained.

There is only one further question discussed in the decision which, by the express language of the decision, *was presented by the intervenor alone.*

The language of the decision is as follows:

"It appears further that upon the 31st day of July, 1897, and before any discovery of oil had been made, Miller's associates and co-locators executed to him a deed of all their right, title and interest in the property. Subsequently, and upon the 17th day of September, 1897, Miller executed a lease of the premises, which lease was transferred to the plaintiff, Home Oil Company. The Home Oil Company thereupon took possession of the premises, bored for, and in the month of October, 1897, struck oil, and made the first discovery upon the land in question. Upon this state of facts intervenor contends that the location was invalid; that the effect of the conveyance of his co-locators to Miller before discovery operated as an abandonment by them of their location, and destroyed the validity

of the whole location; that the validity of the location thus having been destroyed, the subsequent discovery of oil did not and could not serve to validate it, and at the most could have given Miller, as the sole remaining member of the association, the right to re-locate twenty acres about his discovery (p. 126).

"It will be noted that it nowhere appears in the decision, or by the record, that this point was ever presented by the present plaintiffs in error. After thus stating the position, the court determines it in favor of the defendants in error, and against the contention of the intervenor" (pp. 126-127).

As a matter of fact, the only basis for a contention on the part of the plaintiffs in error, in this proceeding is that the court erred in its findings of fact; but the findings are conclusive upon these points and cannot be re-examined for any purpose.

As was said in the case of Egan v. Hart, 165 U. S. 188:

"On error, however, to a State court, this court cannot re-examine the evidence, and, when the facts are found below, is concluded by such finding. Dower v. Richards, 151 U. S., 658; Bartlett v. Lockwood, 160 U. S., 357; Stanley v. Schwalby, 162 U. S., 255, 278. True, it is that in Dower v. Richards the court (referring to the dictum in Republican River Bridge Co. v. Kansas Pacific Railway, 92 U. S., 315, 317), treated as open for further consideration the question whether, in chancery cases, the power existed in this court to review the decision of state courts on both the law and the fact. We, however, conclude that not only the very nature of a writ of error, but also the rulings of this court from the beginning, make it clear that on error to a state court in a chancery case, as in a case at law, when the facts are found by the court below, this court is concluded by such findings. The adjudications are collected very fully in Dower v. Richards and in the subsequent cases referred to."

And this has been repeatedly reaffirmed; see,

Hedrick v. A. T. & S. F. Ry. Co., 167 U. S. 673.
Atchison T. & S. F. Ry. Co. v. Matthews, 174 U. S. 96.
Whitney v. United States, 181 U. S., 104.
Eastern B. & L. Assn. v. Ebaugh, 185 U. S., 114.
Jenkins v. Neff, 185 U. S., 230.
Bement v. National Harrow Co., 185 U. S., 70.

It would seem that there can be no room for argument upon any of these questions. The findings of the state court are conclusive that the Miller location was a valid and subsisting location; that the location was made by Miller and his seven co-locators in good faith; that a valuable discovery of oil was made under that location by the lessee of Miller, The Home Oil Company, before the rights of any other person intervened; that neither of these plaintiffs in error ever made any discovery of oil within the boundaries of their respective claims; that the plaintiffs in error never, at any time, discovered any seepage of petroleum or other mineral, or oil within the boundaries of their respective claims; that their attempted locations were made while Miller and his associates were in the actual possession of the premises in dispute; that at the time Miller's location was made, the land was vacant and unoccupied Government land of the United States. These being the admitted facts upon this hearing, it would seem that the principles of law governing these facts have been so thoroughly well established as to admit of no further argument.

The language in the case of Equitable Life Assurance Society v. Brown, 187 U. S. 308, would seem to be appropriate:

"It is evident on the face of the record that the question on the merits is not open to possible contention, because it has been previously so specifically and adversely ruled on by this

court as to absolutely foreclose further contention on the subject."

As was said in the case of McLaughlin v. Fowler, 154 U. S., 663:

"We can only look beyond the Federal question when that has been decided erroneously, and then only to see whether there are any other matters or issues adjudged by the state court sufficiently broad to maintain the judgment, notwithstanding the error in the decision of the Federal question."

"Murdock v. City of Memphis, 20 Wall., 590."

By an examination of the assignment of errors (pp. 131-133) we note that no Federal question is presented or raised, by inference, or otherwise, and that the chief attack made by the plaintiffs in error herein is against the findings of fact, affirmed by the appellate court. There is not a substantial Federal question presented in any of the assignments of error (pp. 131-133), and this is, therefore, such a case as this court has held shall be affirmed without further delay or argument.

In the case of Wilson v. North Carolina, 169 U. S., 586, it is said:

"Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law or by denying him the equal protection of the laws.

"In Hamblin v. Western Land Company, 147 U. S., 531, it was stated that 'a real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgments of state courts.' Millingar v. Hartupee, 6 Wall. 258; New Or-

leans v. New Orleans Water Works Co., 142 U. S., 79, 87. In the latter case it was said that 'the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay.' "

If it can be conceived that any Federal question is set up, or claimed, or relied upon, it is so devoid of any substantial foundation or merit as to bring it within the decision of this court.

The case of New Orleans Water Works Co. v. Louisiana, 185 U. S. 336, where it is said:

"It has long been the holding of this court that in order to warrant the exercise of jurisdiction over the judgments of state courts there must be something more than a mere claim that a Federal question exists. There must, in addition to the simple setting up of the claim, be some color therefor, or, in other words, the claim must be of such a character that its mere mention does not show it destitute of merit, there must be some fair ground for asserting its existence, and, in the absence thereof, a writ of error will be dismissed, although the claim of a Federal question was plainly set up. Thus, in Millingar v. Hartuppe, 6 Wall., 258, the Chief Justice (at page 261), said: 'Something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence, derived from competent governmental power.' This case arose under the 25th session upon the assertion that the validity of an authority exercised under the United States was drawn in question, and the decision was against its valid-

ity. It was held not sufficient to make the claim, but there must be some color of foundation for its assertion."

And the question of the necessity of a substantial claim was fully reviewed by this court in the late case of Equitable Life Assurance Society v. Brown, 187 U. S. 308. *supra*, in the following language:

"From the analysis just made, it results that although a Federal question was raised below in a formal manner, that question, when examined with reference to the averments of fact upon which it was made to depend, is one which has been so explicitly decided by this court as to foreclose further argument on the subject, and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit. This being so, the case is brought directly within the rule announced in New Orleans Water Works v. Louisiana, 185 U. S., 336, 345, 46 L. ed. 936, 941, 22 Sup. Ct. Rep. 691, and authorities there cited. It is likewise so apparent from the analysis previously made that even if the formal raising of a Federal question was alone considered on the motion to dismiss and therefore the unsubstantial nature of the Federal question for the purposes of the motion to dismiss were to be put out of view, the judgment below would have to be affirmed. This follows, since it is plain that as the substantiality of the claim of Federal right is the matter upon which the merits depend, and that claim being without any substantial foundation, the motion to affirm would have to be granted under the rule announced in Chanute v. Trader, 132 U. S., 210, 33 L. ed. 345, 10 Sup. Ct. Rep. 67; Richardson v. Louisville & N. R. Co., 169 U. S., 128, 42 L. ed. 687, 18 Sup. Ct. Rep., 268, and Blythe v. Hinckley, 180 U. S., 338, 45 L. ed. 561, 21 Sup. Ct. Rep., 390."

In the case of Wabash R. Co. v. Flannigan, 192 U. S. 28, 40 L. ed. 328, Justice White says:

"As the settled rule in this court is that where the Federal question asserted to be contained is manifestly lacking all color of merit, the writ of error must be dismissed (Swafford v. Templeton, 185 U. S. 487, 493, 46 L. ed. 1005, 1008, 22 Sup. Ct. Rep. 783, and cases cited), it results that the writ of error in this case must be dismissed for want of jurisdiction."

We again refer to the case of Beals v. Cone, 188 U. S., 184, *supra*, where it is said:

"Indeed, while this case has evidently been hotly contested, yet the matters which were subjects of controversy and determination were questions of fact concerning the time, extent and effect of the alleged discoveries of mineral, and also alleged wrongs in respect to the jury. To those matters, and those alone, was the attention of the parties and the courts directed. Counsel for plaintiff in error has filed an elaborate brief of 249 printed pages, which is able and exhaustive, both on questions of mining law and the conduct of the trial. One cannot, however, fail to be impressed, after a perusal thereof, with the fact of a failure to recognize that there is no general right to a writ of error from this court to the courts of a state; that there is but a special right, a right to bring such cases, and such cases only, as disclose a Federal question distinctly ruled adversely to the plaintiff in error. We fail to see that any right, title, privilege or immunity of a Federal nature was specially set up and claimed. Very likely the construction and the effect of Federal statutes were, in a general way discussed and considered but nowhere do we find that special setting up or claiming of a Federal right which justifies us in taking jurisdiction. As we have stated, the validity of no Federal statute was denied

in the state courts. Neither did the plaintiff in error, prior to the judgment of affirmance in the Supreme Court, challenge the validity of any state statute on the ground of its repugnance to paramount Federal law. The writ of error is dismissed."

Upon all the authorities here presented, applied to the facts as disclosed by the record, we respectfully ask that the writ of error be dismissed, or, if not dismissed, that the judgment be affirmed. Respectfully submitted,

L. L. CORY,
Attorney and Counsel for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1894.

No. 274.

A. T. GERLINGER and E. A. GERLINGER,
Plaintiffs in Error,

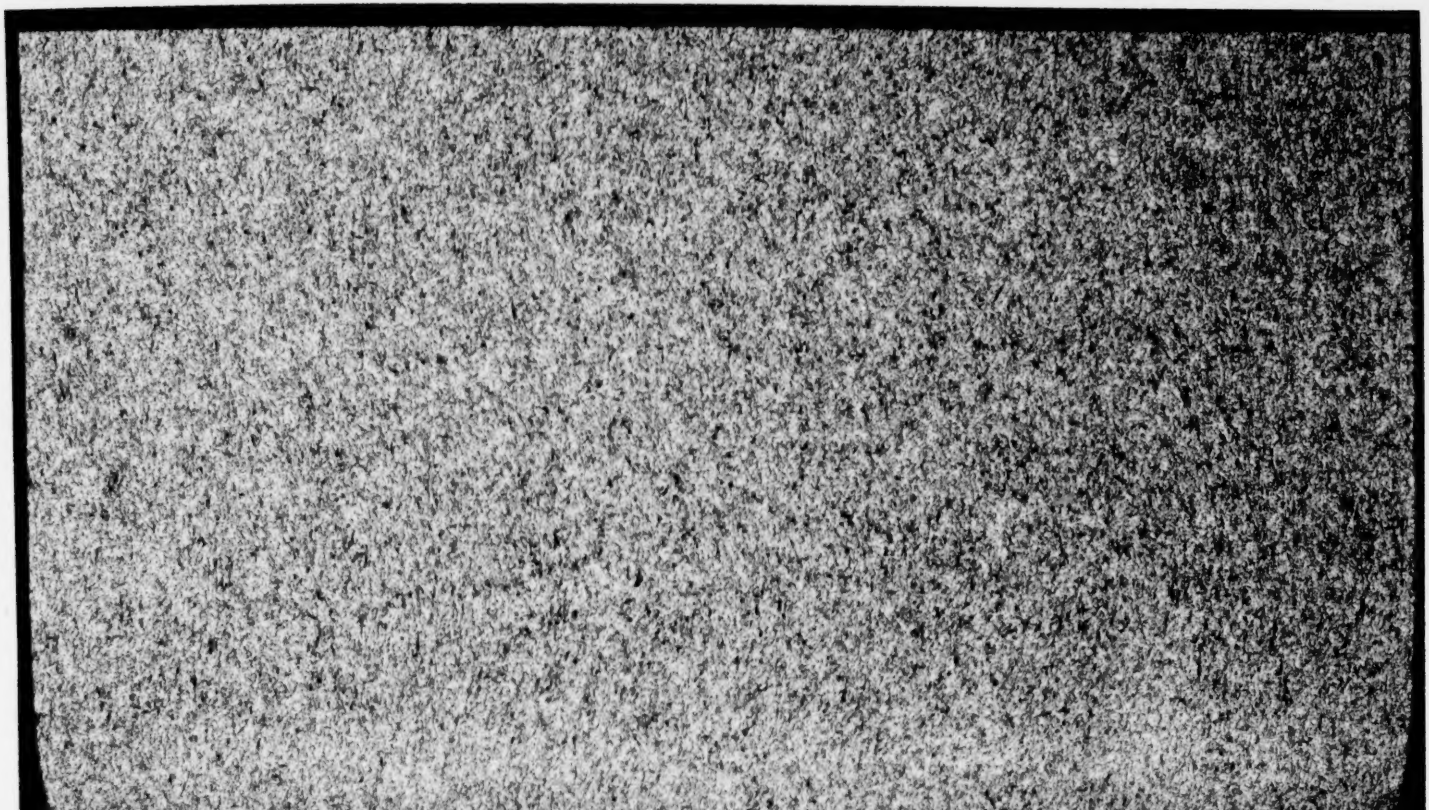
vs.

K. G. MILLER and THE HOME OIL COMPANY,
Defendants in Error.

In Error to the Supreme Court of the State of California.

BRIEF ON BEHALF OF THE DEFENDANTS IN ERROR.

L. L. Coey,
Attorney and Counsel for Defendants in Error.



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1904.

No. 171.

A. Y. CHRISMAN and H. T. CHRISMAN,
Plaintiffs in Error,

vs.

E. O. MILLER and THE HOME OIL COMPANY,
Defendants in Error.

In Error to the Supreme Court of the State of California.

BRIEF ON BEHALF OF THE DEFENDANTS IN ERROR.

This is an action brought originally in the Superior Court of the County of Fresno, State of California to quiet title to the northeast quarter of section 20, in township 19 south range 15 east, M. D. B. & M.

The plaintiffs in error herein, the defendants in that action, A. Y. Chrisman and H. T. Chrisman, filed a joint answer, each claiming a specific twenty acres of the tract mentioned in the complaint of the defendants in error. All the

parties claimed the land under and by virtue of locations, alleged to have been made by them thereon, under the laws of the United States regulating the sale and disposition of the mineral lands of the United States. A judgment was rendered in the lower court in favor of the defendants in error, all the material facts in the controversy being found and established by that Court in favor of these defendants in error. Upon appeal to the Supreme Court of the State, the judgment of the lower court, and its findings of fact, were approved and affirmed.

1.

STATEMENT OF THE CASE.

The trial of this action was had before the court, sitting without a jury, and the findings of the court are full and complete upon every controverted issue of fact, and by reference to them the history of the case will be disclosed. From them it will be seen that the court has found the following ultimate facts:

That E. O. Miller, one of the defendants in error, is the owner of the land in controversy.

Record, page 21.

That the other defendant in error, as the lessee of said property, at the commencement of the action, was in the actual possession of every part of said territory. That A. Y. Chrisman and H. T. Chrisman, the plaintiffs in error, claimed an interest in said property, adverse to the defendants in error, but that their claim is without right.

Record, page 22.

That on the 31st day of December, 1896, the property in controversy was a portion of the public domain of the United States and open to exploration and location for mining purposes under the laws of the United States.

Record, page 22.

That said land was, and is, chiefly valuable for the petroleum and other oils contained therein.

Record, page 23.

That on the 31st day of December, 1896, E. O. Miller and seven associates, each of them being citizens of the United States and over the age of twenty-one years, as an association of persons, made a mineral location upon said northeast quarter of said section 20 by posting upon said land

a notice of location, and they thereupon marked said location upon the ground so that the boundaries thereof could be readily traced.

Record, page 23.

That on the 31st day of July, 1897, J. A. Hannah and six of the other co-locators, for a valuable consideration, transferred unto the defendant in error, E. O. Miller, all of their right, title, interest, estate and ownership in and to said property, and all their right, title, interest, estate and ownership owned under or by virtue of said mineral location, and that on September 17th, 1897, E. O. Miller did lease unto Frank Barrett said premises, that Frank Barrett, thereupon went into possession of the same under the terms of said lease, and on said day, did transfer his leasehold interest to the defendant in error, The Home Oil Company, and that the latter Company went into the *immediate possession of all of said property and ever since has been, and now is, in the exclusive possession of all thereof.*

Record, page 23.

That immediately after going into possession of said quarter section, the Home Oil Company commenced the development of said territory and expended therein the sum of more than $30,000.00, and by means of its operations discovered large quantities of petroleum therein, and there now exists, and did exist at the commencement of this action, wells of great depth sunk and excavated upon said property by said lessee, from which there is a daily flow of large quantities of petroleum of great value.

Record, page 24.

That on January 1st, 1897, the date of the alleged locations made by the plaintiffs in error herein, no portion of

said territory was open to exploration or location for mining purposes under the laws of the United States.

Record, page 24.

That on said first day of January, 1897, the plaintiffs in error herein, A. Y. Chrisman and H. T. Chrisman, each did enter upon a portion of said quarter section, and each attempted to make a location thereon of twenty acres for mineral and mining purposes.

Record, pages 24, 25.

That neither A. Y. Chrisman nor H. T. Chrisman, at any time, discovered a seepage of petroleum, or other mineral oil upon said land, or any part thereof, and that the only discovery of petroleum, or any other fluid product upon said land, or any part thereof, was the discovery made by the Home Oil Company.

Record, page 25.

That on said first day of January, 1897, all of said quarter section was in the possession of E. O. Miller and his seven co-locators under and by virtue of their location, as found by the court.

Record, page 25.

That the plaintiffs in error, A. Y. Chrisman and H. T. Chrisman, did not make their alleged locations for mining purposes in good faith, and that neither of them did enter into the possession of any part of the territory for the purpose of working or mining the same at any time, and they have not, nor has either of them, at any time, done or performed upon said land, or any part thereof, such work and labor, or made improvements thereon as required by the laws of the United States.

Record, page 25.

That on the 14th day of June, 1895, certain persons, viz: Frank Barrett and others, pretended to make upon said quarter section, a mineral location which was called the King Petroleum Mining Claim; that subsequently said alleged locators did make, execute and deliver to the Producers' and Consumers' Oil Company a deed of their interest in said land, and that thereafter, and on December 24th, 1896, said corporation made, executed and delivered unto E. O. Miller a quit claim deed to its interest in the property, and that on the 31st day of December, 1896, said E. O. Miller abandoned and relinquished his interest therein so acquired to the United States of America.

Record, page 26.

That on said 14th day of June, 1895, the said Frank Barrett and the other persons attempting to make said locations, other than A. Barieau, were not citizens of the United States, or qualified to make a mineral location under the laws of the United States, and said persons did not, in fact, make any such mineral location on said date, and that said parties have not, nor has either one of them, nor the said Producers' and Consumers' Oil Company, nor the said E. O. Miller, ever had or held any right, title, interest, claim, possession, or right of possession in or to said property, or any part thereof, under said attempted location, or under said deeds of conveyance.

Record, page 27.

That the allegations contained in paragraphs 1, 2, 3, 4, 5, and 6 of the third further and separate defense, of the plaintiffs in error herein, are not true.

Record, pages 13, 14, 15, 27.

2.

CONTENTIONS OF THE DEFENDANTS IN ERROR.

Defendants in error contend:

(a). That the asserted contentions of the plaintiffs in error, numbered I, II, III, IV, V, and VI, being all of the propositions upon which the plaintiffs in error rely, are entirely dependent for their solution upon the determination of questions of fact, and the findings of fact of the trial court, affirmed by the Supreme Court of the State of California, are conclusive upon this Court, and are determinative of all the questions raised by the plaintiffs in error in support of the writ of error.

(b). That the decision of this case in favor of the defendants in error by the trial court and the Supreme Court of the State of California was correct, and the judgment of the Supreme Court should be affirmed.

(c). That this court has no jurisdiction to hear or determine this controversy for the reason that no Federal question was ever specially set up or claimed by these plaintiffs in error in the courtsof the State of California, and that the decision of the Supreme Court of the State of California was based upon a ground which did not involve a Federal question, and which was broad enough to support the judgment.

3.

PRESENTATION OF THE ARGUMENT.

(a) That the asserted contentions of the plaintiffs in error, numbered I, II, III, IV, V and VI, being all of the propositions upon which the plaintiffs in error rely, are entirely dependent for their solution upon the determination of questions of fact, and that the findings of fact of the trial court, affirmed by the Supreme Court of the State of California, are conclusive upon this Court, and are determinative of all the questions raised by the plaintiffs in error in support of the writ of error.

We understand the rule to be elementary and well settled that the findings of fact of the trial court, affirmed by the Supreme Court, are conclusive and final, and that all the facts so found will be taken as true upon this hearing. The contentions of the plaintiffs in error referred to will be found upon pages 6 to 8, inclusive, of their brief.

In the case of Minneapolis & St. Louis R. Co. v. Minnesota *ex rel* Railroad & W. Com., 193 U. S. 53, Justice McKenna, after quoting the findings of the lower court, said:

"The finding, like the verdict of a jury, is conclusive in this court. Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452. It follows that the order of the Warehouse Commission was not an unreasonable requirement, and the judgment is affirmed."

In the leading and very important case of Clipper Min. Co. v. Eli Min. & L. Co., 194 U. S. 220, the same question

was up for consideration; in the course of its decision, the court said:

"It is the settled rule that this court, in an action at law, at least, has no jurisdiction to review conclusions of the highest court of a state upon questions of fact. Republican River Bridge Co. v. Kansas P. R. Co. 92 U. S. 315, 23 L. ed. 515; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; Israel v. Arthur, 152 U. S. 355, 38 L. ed. 474, 14 Sup. Ct. Rep. 583; Noble v. Mitchell, 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. Rep. 110; Hedrick v. Atchison, T. & S. F. R. Co., 167 U. S. 673-677, 42 L. ed. 320, 321; 17 Sup. Ct. Rep. 922; Turner v. New York, 168 U. S. 90-95, 42 L. ed. 392-394, 18 Sup. Ct. Rep. 38; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300. It must, therefore, be accepted that the Searl placer claim was duly located, that the annual labor required by law had been performed up to the time of the litigation, and that there was a subsisting valid placer location, and that the lodes were discovered by their locators within the boundaries of the placer claim subsequently to its location. So the trial court specifically found, and its finding was approved by the supreme court. * * *

"The difficulty with the case presented by the plaintiff in error is, that under the findings of fact, we must take it that the entries of the locators of these several lode claims upon the placer grounds were trespasses, and as a general rule no one can initiate a right by means of a trespass. Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 732; Trenouth v. San Francisco 100 U. S. 251, 25 L. ed. 626; Haws v. *Victoria Copper Min. Co. 160 U. S. 303, 40 L. ed. 436, 16 Sup. Ct. Rep. 282. See also Cosmos Exploration Co. v. Gray Eagle Co.

61 L. R. A. 230, 50 C. C. A. 79, 112 Fed. 4, in which the court said (L. R. A. p. 242, C. C. A. p. 93, Fed. p. 17):

'No right can be initiated on government land which is in the actual possession of another by a forcible, fraudulent or clandestine entry thereon. Cowell v. Lammers, 10 Sawy. 246, 21 Fed. 200, 202; Nevada Sierra Oil Co. v. Home Oil Co. 98 Fed. 674, 680; Hosmer v. Wallace, 97 U. S. 575, 579, 24, L. ed. 1130, 1132; Trenouth v. San Francisco, 100 U. S. 251, 25 L. ed. 626; Mower v. Fletcher, 116 U. S. 380, 385, 386, 29 L. ed. 593, 595, 6 Sup. Ct. Rep. 409; Haws v. Victoria Copper Min. Co. 160 U. S. 303, 317, 40 L. ed. 436, 440, 16 Sup. Ct. Rep. 282; Nickals v. Winn, 17 Nev, 188, 193, 30 Pac. 435; McBrown v. Morris, 59 Cal. 64, 72; Goodwin v. McCabe, 75 Cal. 584, 588, 17 Pac. 705; Rourke v. McNally, 98 Cal. 291, 35 Pac. 62.'

"If a placer locator is, as we have shown, entitled to the exclusive possession of the surface, an entry thereon against his will, for the purpose of prospecting by sinking shafts, or otherwise, is undoubtedly a trespass, and such trespass cannot be relied upon to sustain a claim of a right to veins or lodes."

In the case of Thayer v. Spratt, 189 U. S. 346, Mr. Justice Peckham, speaking for the court, says:

"But, however this may be, we are precluded by the finding of facts in the state court from looking at the evidence upon which such findings may rest. Upon a writ of error to a state court this court has no right to review its decision upon the ground that the finding was against the evidence or the weight of evidence. Egan v. Hart, 165 U. S., 188, 41 L. ed. 680, 17 Sup. Ct. Rep., 300; Gardner v. Bonestall, 180 U. S., 362, 370, 45 L. ed., 574, 577, 21 Sup. Ct. Rep., 399; Bement & Sons v. National Harrow Co., 186 U. S., 70,

46 L. ed., 1058, 22 Sup. Ct. Rep., 747; Jenkins v. Neff, 186 U. S., 230, 235, 46 L. ed., 1140, 1143, 22 Sup. Ct. Rep., 905."

In the case of Jenkins v. Neff, 186 U. S., 230, it is held:

"Further, although there is in the record quite an amount of testimony as to the assets and business of trust companies in Brooklyn, yet the case was determined by the supreme and appellate courts of New York upon findings of fact,—which findings do not sustain the contention of the plaintiffs in error in this respect,—and it is well settled that the findings of fact in the state court are on a writ of error conclusive with us. Hedrick v. Atchison, T. & S. F. R. Co., 167 U. S., 673, 677, 42 L. ed., 320, 321, 17 Sup. Ct. Rep., 922, and cases cited therein; E. Bement & Sons v. National Harrow Co., 186 U. S., 70; *ante*, 1058, 22 Sup. Ct. Rep., 747a. In other words, we apply the law to the facts settled in the State courts, and we do not search the record to see if there be not disclosed by the testimony some other matters not embraced in the findings which may affect the conclusion."

In the case of E. Bement & Sons v. National Harrow Co., 186 U. S., 70, it is said:

"In this court we are concluded by the findings of fact made in a state court in a suit in equity, as well as in an action at law. Dower v. Richards, 151 U. S., 658, 666, 38 L. ed., 305, 308, 14 Sup. Ct. Rep., 452; Israel v. Arthur, 152 U. S., 355, 38 L. ed., 474, 14 Sup. Ct. Rep., 583; Egan v. Hart, 165 U. S., 188, 41 L. ed., 680, 17 Sup. Ct. Rep., 300; Hedrick v. Atchison, T. & S. F. R. Co., 167 U. S., 673, 677, 42 L. ed., 320, 321, 17 Sup. Ct. Rep., 922."

In the case of Egan v. Hart, 165 U. S., 188, it was said:

"On error, however, to a State court, this court cannot re-examine the evidence, and, when the facts are found below, is concluded by such finding. Dower v. Richards, 151 U. S., 658; Bartlett v. Lockwood, 160 U. S., 357; Stanley v. Schwably, 162 U. S., 255, 278. True, it is that in Dower v. Richards the court (referring to the dictum in Republican River Bridge Co. v. Kansas Pacific Railway, 92 U. S., 315, 317), treated as open for further consideration the question whether, in chancery cases, the power existed in this court to review the decision of state courts on both the law and the fact. We, however, conclude that not only the very nature of a writ of error, but also the rulings of this court from the beginning, make it clear that on error to a state court in a chancery case, as in a case at law, when the facts are found by the court below, this court is concluded by such findings. The adjudications are collected very fully in Dower v. Richards and in the subsequent cases referred to."

In the light of these decisions, the plaintiffs in error are precluded from presenting for the consideration of this court any of their contentions specified upon pages 6 to 8, inclusive, of their brief, as all of these contentions are based upon disputed questions of fact, all of which have been resolved in favor of these defendants in error.

As we understand the present situation in this case, this court and counsel in the presentation and determination of this case must concede and assume the following as the ascertained and determined facts in this case:

(1.) That the location by Barieau and others, upon the 14th day of June, 1895, was not a valid location, and did not divest the land of its status as part of the public domain

and did not appropriate it to private claim or domain at any time.

Record, pages 26, 27, 122.

The reference is to the findings of the trial court where it is found that the co-locators, with Barieau, were not citizens of the United States, or qualified to make a mineral location under its laws, and that no such mineral location was, in fact, made on June 14th, 1895, upon any portion of the property in controversy.

The decision of the Supreme court upon this question is, in part, as follows:

"If, however, the Barieau location was not a valid location, as the court finds, then the lands were open to notorious, peaceable, and *bona fide* entry by others for the purpose of initiating a new location. The findings of the court, as has been said, were against the validity of the Barieau location."

"Without discussing other grounds of objection made to that location, we are satisfied that it was invalid for at least one reason. Barieau and his co-locators did not at the time of their attempted location, nor ever, make any discovery of mineral upon the land."

(2.) That the abandonment by E. O. Miller, on December 31st, 1896, was invalid and inoperative and of no effect, not because it was made with any intent to re-locate the property, but because the Barieau location, being invalid, there was nothing for E. O. Miller to abandon. This is the second contention presented by the plaintiffs in error.

(Page 6 of their brief.)

As we have seen, the findings of the trial court were that no such location was made, as was attempted to be abandoned

by E. O. Miller, and that the attempted abandonment was not made for the purpose of avoiding the necessity of doing the assessment work.

Record, page 29.

Upon these questions, the Supreme Court says:

"And first it is insisted that the location is invalid because Miller, prior to his location, but upon the same day executed an abandonment to the Government of all rights under the Barieau location, and it is contended that this invalidated the location subsequently made, because such pretended abandonment was not made in good faith, but designed as a fraud upon the United States to evade the performance of the assessment work required by law. But the answer to this is that the court, upon sufficient evidence, finds against this contention, and, furthermore, as the Barieau location was itself invalid, there was no occasion for an abandonment of it, because there was nothing to abandon."

(3.) That the location made by E. O. Miller and others on December 31st, 1896, was invalid, and that there was not at that time any valid, subsisting location on the land, and that the land was open to exploration and location; that it was based on a discovery, and that no rights to third parties had attached to the property before a discovery had been made, and that the location, in fact, was not made by Miller, Hall and Hannah alone, and that the other five co-locators were not mere dummies. The findings of the trial court are full and explicit upon these questions.

Record, pages 23 to 30.

Upon these questions the decision of the Supreme court is as follows:

"So, too, the evidence warrants the finding of the court

that the persons named as co-locators in the Miller location were *bona fide* locators, and that the location was made for the benefit of them all. Likewise, upon sufficient evidence, the court's finding negatives the charge of fraud, collusion and conspiracy upon the part of these locators."

"It is disclosed by the evidence that Miller, his associates and lessees remained in possession of the land, and with diligence and great expense prosecuted the work of boring wells. This work finally resulted in success, oil was discovered in paying quantities, and the land became extremely valuable. Plaintiffs thus, not only made a discovery, but are the ones of all the alleged co-locators who have done so."

(4.) That the land, on the first day of January, 1897, was not open to exploration and location at the time the plaintiffs in error attempted to make their locations thereon, and that the attempted location made by Barieau never did lapse for the reason that no location was ever made.

This is the fourth contention presented on behalf of the plaintiffs in error.

These facts, being so found, are sufficient to dispose of the fourth contention presented by the plaintiffs in error.

(Brief, page 7.)

(5.) That the locations attempted to be made by the plaintiffs in error were not valid locations, and were not followed up by the doing of any of the things required by law in order to make a valid mining location of the premises.

The court's finding in that behalf, is that the plaintiffs in error never, at any time, discovered a seepage of petroleum, or other mineral oil upon their respective lands sought to be so located, and that upon the date of their alleged locations, no part of said premises was vacant and public mineral land, or open to exploration or location for mining purposes, but

was in the possession of E. O. Miller and his co-locators, and that the plaintiffs in error did not make their respective locations in good faith, or entered into the possession of their alleged locations, and have never done any work or labor thereon.

Record, page 25.

In other words, the facts upon which the contentions of the plaintiffs in error are based, and which are now presented for the consideration of this court, are found adversely to their contentions, and are not questions of law which can again be re-argued and presented to this court. The record establishes conclusively, upon sufficient facts, that at the time E. O. Miller and his co-locators located this quarter section, it was vacant, unappropriated public land of the United States; that their location was properly made, and the boundaries thereof were marked so the same could be readily traced, and that an actual discovery of mineral was made thereon under that location, and that the land was not open to exploration and location when these plaintiffs in error attempted to make their respective locations, but that it was at the time in the actual possession of E. O. Miller and his associates; that the plaintiffs in error never, at any time, made any discovery of mineral thereon, and never entered into the possession thereof, or did any work thereunder as required by the laws of the United States, or otherwise.

These facts being taken as true, it necessarily follows, that the plaintiffs in error were mere trespassers, and that the location, under which the defendants in error claim was a valid and subsisting location and vested in them a possessory right, which was superior in every way to any asserted claim on the part of these plaintiffs in error. Upon these facts alone the judgment of the Supreme Court of the State of California should be affirmed.

(b) That the decision of this case in favor of the defendants in error by the trial court and the Supreme Court of the State of California was correct, and the judgment of the Supreme Court should be affirmed.

From our theory of the case it would seem quite unnecessary to present for the consideration of the court the arguments made on behalf of these defendants in error in the courts of California in support of their contentions upon the merits in this case, in view of the fact that these contentions upon controverted and disputed questions of fact, were determined in their favor.

The plaintiffs in error have seen fit to attempt to again re-argue, in their brief, the merits of this case upon these questions of fact, quite as elaborately and as earnestly as though all of these facts were open for the consideration of this court. As counsel for the plaintiffs in error has seen fit to re-argue the entire case upon the theory that these questions of fact were again open for discussion, out of an excess of caution we deem it best to submit to this court our views in opposition thereto.

The property involved in this location is very valuable. It is "oil land" in the Coalinga district, situated in Fresno county, and it was upon this identical land that among the very first valuable discoveries of petroleum in the State of California were made, and was practically the genesis and beginning of the oil industry in that state, which has now assumed large proportions. The record shows that these discoveries were made by the labor and capital of the defendants in error, and that the value which this property now possesses has been established as the result of their industry and courage.

The plaintiffs in error claim to have located upon a portion of this quarter section on January first, 1897. This action was instituted by the plaintiffs on the 14th day of October, 1898. During this interval of nearly two years, the defendants in error were engaged in the honest and earnest endeavor to develop this property. It was during this time that they expended the money, performed the labor and made the discovery shown by the record. By this expenditure of money and the performance of this labor within the limits of the quarter section they, for the first time, established the fact that the land is most valuable and *worth litigation*, although these plaintiffs in error have not, at any time, seemed to think that it was worth any labor or the expenditure of their money in its development.

The briefs submitted on behalf of the plaintiffs in error show great learning and industry, but in our opinion much of it is quite unnecessary and pedantic. In their brief they pile up a large citation of authorities to establish legal propositions which are so fundamental that no one would think of denying them, and which, in fact, tend to support the case of the defendants in error. A multitude of these authorities announce legal propositions correct in themselves but which have no bearing upon any matter to be determined here, and in this brief counsel *assume as facts* facts which are directly in the teeth of the findings of the court, and which are without any sort of support from the evidence.

Upon the record of this case we assert, on the part of the defendants in error upon the merits of this case, the following contentions:

(1) *The location made by A. Baricau and others on June 14th, 1895, was absolutely void and not sufficient to segregate*

the land from the public domain of the United States, nor to prevent a valid location being made on the land prior to the 1st day of January, 1897.

The plaintiffs in error introduced some testimony in an effort to prove that one A. Barieau, for himself and seven others, under the laws for the exploration and disposition of the mineral lands of the United States, on the 14th day of June, 1895, made a location upon all of the land claimed by defendants in error.

We wish here to call the court's attention to the fact that the plaintiffs in error attempted to prove this location by the testimony of Barieau alone. It is not pretended that any person was with Barieau at the time he made this alleged location, or that any one, save Barieau, did any act on June 14th, 1895, towards making such a location. Nor is it claimed that the notice of location which Barieau testified that he posted on the land was ever seen by any human eye excepting his own.

The court saw fit to disbelieve the testimony of Mr. Barieau; the court did not think proper to take from the defendants in error property, worth thousands of dollars, and turn it over to the plaintiffs in error upon the unsupported testimony of this witness. That the court was entirely correct in its refusal to do so is very apparent from the record in this case.

Let it be remembered that the plaintiffs in error claim no right in themselves under this pretended location, made by Barieau in June, 1895. Their claim is under another and different location made by themselves on the 1st day of January, 1897. The significance claimed for this Barieau location is no more than this: That it operated to segregate the lands from the public domain of the United States, and, by itself,

without any other act being done, prevented a location being made on the land in question prior to the 1st day of January, 1897.

Now, we admit, without reservation or qualification, and in all its length and breadth, the proposition that a valid existing location upon mineral lands will, during all the year in which it was made and during all of the succeeding year, operate to prevent any other mineral locations upon the same land, and that any such attempted location is absolutely void. We are surprised to find that counsel deem it necessary to argue a proposition so fundamental in its character, and to burden their briefs with citations of authorities in support of a point which it is impossible for any one to deny.

We take issue with counsel, not upon the law, but upon the facts. We say that Barieau did not make any such location as he pretends, and that such a location never at any time existed. The court has so found, and the evidence is amply sufficient to support the findings of the court.

1. Barieau's attempted location was utterly void, because his alleged co-locators, Frank Barrett, J. W. Brown, James McLean, James E. Campbell, James A. McClurg, Hart H. Barrett and J. J. Bright, were not citizens of the United States, and were not qualified to make a mineral location under the laws of the United States and of the laws of the State of California.

2. Barieau did not make any discovery of mineral upon the land.

3. The boundaries of the claim were not distinctly marked upon the ground so that they could be readily traced.

4. The attempted location was made for an association of persons, and was made by Barieau without any such association having been first previously formed and without the

knowledge of any of the persons constituting such pretended association.

The right to explore and locate the mineral lands of the United States is confined to citizens of the United States, or those persons who have declared their intentions to become citizens.

U. S. Rev. Statutes, Section 2319.

North Noonday Mining Co. v. Oriental Mining Co., 1st Fed. Rep., 522.

Wood, et al., v. Aspen Mining & Smelting Co., 36 Fed. Rep., 25.

O'Riley v. Campbell, 116 U. S. Rep., 418.

In Billings, et al., v. Aspen Mining & Smelting Co., 51 Fed. Rep., 338, and 52 Fed. Rep., 250, in the Circuit Court of Appeals, 8th Circuit, District of Colorado, distinguishes O'Riley v. Campbell, *supra,* but that was a case where the party who sought to defeat the claims of an alien's heirs, on the ground of the alienage of their ancestor, was himself a co-locator with the alien and claimed under the location.

In the State of California it has long been held to be the law that no one not a citizen, or person who has declared his intention to become such, could acquire any right in the mineral lands of the United States. It has been explicitly so decided by this court upon several occasions.

LeDoon v. Tesch, 68 Cal., 43.

Anthony v. Jillson, 83 Cal., 296.

Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal., 100.

(2) *The alleged Baricau location was utterly void because not based upon any discovery of minerals within the limits of the lands located.*

It was hardly necessary for counsel for plaintiffs in error

to cite authorities in support of the proposition that a valid location must be based upon a discovery of mineral within the limits of the lands located. Such is the undoubted law. Discovery lies at the very basis of the right of location and a right of location is most certainly dependent upon it; or perhaps it would be more correct to say, that discovery of mineral is part and parcel of the act of location.

We now apply this admitted principle to this alleged Barieau location and submit that it clearly appears from the evidence that his alleged location was not based upon any discovery of mineral, and that, in fact, he never made any such discovery at all.

Let it be borne in mind that this alleged discovery, like every other matter and thing necessary to the validity of his alleged location, depends entirely upon the testimony of Barieau. We think the trial court was justified in doing what we believe it did do, that is, put his testimony entirely out of the case. But if his testimony should be taken as true it is very far from being sufficient to establish a discovery. Counsel say, in speaking of Barieau, "He made a discovery of petroleum or oil on the land in question." Mr. Barieau does not say so. He says:

Record, page 65:

"At the time I posted the notice I had been over the land in question very much of the entire northeast quarter and had discovered *indications of* petroleum thereon. I made the discovery near the east line of the northeast quarter."

And at,

Record, page 68,

he speaks of the indications of oil he discovered on this northeast quarter in June, 1895. He says, "There is a spring there and the oil comes out and floats over the water in the

summer time when it is hot. In June, 1895, there was a little water with oil and a little oil with the water was coming out; it was dripping over a rock about two feet high; there was no pool, it was just dripping, a little water and oil, not much water."

It will be observed that the witness does not pretend that he made any explorations of the land by digging, or any sort of excavations whatever, and that the labor performed and the exploration made by him consisted only in walking over the land.

Now, indications of oil are not oil; discovery of the indication of a thing is not the discovery of the thing itself. Discovery of reason for believing in the existence of a certain fact is not knowledge of the fact itself.

As between rival locators of mineral land the courts have been liberal in fixing the requirements of a valid discovery; but even under the liberal rule as thus established, defendants are very far from proving any discovery upon which to base the Barieau location. There is, however, some slight difficulty in applying the rule as announced by the courts, for the reason that in almost all, and in fact, we believe in every case, where the requirements of a valid discovery were discussed the question arose upon contending *lode* locations, that is, locations upon "rock in place." The court is here concerned with an alleged placer location and, perhaps, it will be somewhat difficult to apply the rule founded upon the facts alleged in support of a placer location to the facts alleged in support of lode location. However, all rules of law are founded upon certain principles, and when the principles upon which the rule is established are clearly apprehended there will be little difficulty in applying the rule.

A mineral discovery sufficient to warrant the location of

a mining claim, may be regarded as proven where mineral is found, and the evidence shows that a person of ordinary prudence would be justified in the FURTHER expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

Harrison v. Chambers, 1st Pac. Rep., 362.

Shreve v. Copper Bell M. Co., 28 Pac. Rep., 315.

Let it be observed that the discovery here spoken of is a discovery *resulting from the expenditure of the locator's labor and means.*

In the matter of this alleged location, there is no evidence that he expended any labor or means in making his alleged discovery; but there is affirmative evidence that he did not, and there is no evidence proving the significance of these alleged "indications" found by Barieau, or enabling the court to determine whether or not, upon those indications, a person of ordinary prudence would be justified in the expenditure of his labor and means. The court cannot say as a matter of law, nor can the court make any presumption of the fact, that the "indications" mentioned afforded any sort of evidence or proof of the existence of a body of petroleum within the limits of the claim located.

In the case of Harrison v. Chambers, 1st Pac. Rep., 362, *supra*, it is said that expert testimony is admissible to show that a claim contains certain veins as the miners discovering it would be likely to follow with reasonable expectations of finding paying ore. In this case there is no such testimony introduced by the plaintiffs in error; upon the contrary, expert testimony was introduced by the defendants in error by which it was shown that the "indications" spoken of by Barieau, so far as showing the existence of petroleum within

the claims as located, were, in fact, evidence of the existence of petroleum at a place beyond and above the claim.

Record, pages 96, 97.

"It is the finding of the mineral in rock in place as distinguished from float rock that constitutes the discovery and warrants the prospectors in making a location of a mining claim."

Book v. Justice M. Co., 58 Fed. Rep., 106.

"Mere discovery of fragments of mineral bearing ore not in lode formation will not form the basis of a valid location of a lode claim."

Waterloo M. Co. v. Doe, 56 Fed. Rep., 685.

This is undoubtedly correct, and the reason is obvious; the discovery of these fragments would be no sort of evidence of the existence of mineral rock in place; in other words, no evidence of the existence of mineral *within the limits of the claim.*

Now, Barieau says that these "indications" which he discovered *were in motion;* "there was a little water with oil and a little oil with water coming out." This would be no better evidence of the existence of oil within the limits of the location than was the finding of fragments of mineral rock evidence of the existence of a lode within the location. The facts must show that the location was made in good faith, and not simply upon a conjecture or imaginary existence of a vein or lode which cannot be permitted.

Locations existing simply upon a conjecture or imaginary existence of a vein or lode within their limits shall not be permitted. *A location can only rest upon an actual discovery of the vein or lode.*

King v. Mining Co., 152 U. S., 227.

We quote now from a leading authority which we believe very succinctly announces the true rule:

"These indications were of such character that miners in that district would follow in the expectation of finding ore and such as would justify miners in working the claim for that purpose. The rock in these seams was different from the country rock, and was of such character as was designated by the witnesses, who were practical miners, as 'a vein containing rock in place bearing minerals.' These facts show that the location was made in good faith and not simply upon a conjectural or imaginary existence of a vein or lode which cannot be permitted. The seams containing mineral bearing rock which were discovered before the location was made were similar in their character to the seams or vein of mineral matter that had induced other miners to locate claims in the same district, which, by continued development thereon, had resulted in the establishment of the fact that the seams, as depth was obtained thereon, were found to be a part of a well defined lode or vein containing ore of great value. The discovery made at the time of the Kerby location was, therefore, such as to justify a belief as to the existence of such a lode or vein within the limits of the ground located."

Shoshone M. Co. v. Rutter, 87 Fed. Rep., 801-807.

In the case now before the court, there is no evidence that the "indications" discovered by Barieau were of such a character as the miners in that district would follow, and there is no evidence that these "indications" would justify miners in working the claim, and there is no evidence that practical miners ever had or ever would attach any significance to these indications, and there is no evidence that indications of similar character had ever been followed up by any persons

whatever or had ever resulted in the finding or development of a petroleum claim.

Mr. Lindley, in his excellent work on Mines, says correctly that the tendency of the courts is toward marked liberality of construction where a quesion arises between two miners, and he cites many cases showing the tendency of the courts towards that liberality. He also marks the lines beyond which the court will not go.

"But an expectation is something more than a hope. A location made in the hope of finding some ore in it at some time is worthless unless the hope should be realized before some one else makes a discovery. While the courts permit a liberal construction, the liberality must be exercised within reasonable and common sense limits. Locations are not permitted upon a conjectural or imaginary existence of a vein."

And again he says: "While the courts may not be enabled to define with sufficient accuracy for all purposes what is necessary to constitute a discovery, they may have no difficulty in discriminating between the genuine and counterfeit, the real and the sham."

1st Lindley on Mines, Sec. 336, p. 436.

We think the court will have little difficulty in finding that the discovery, alleged to have been made on the 15th day of June, 1895, was counterfeit and not genuine, sham and not real.

3. *The Baricau location was not distinctly marked on the ground so that its boundaries could be readily traced.*

We suppose it will not be questioned that this marking of the boundary of the claim on the ground so that it can be readily traced is absolutely necessary to the validity of the location. (See Rev. Stat. U. S., Sec. 2324.)

The distinct marking of the location on the ground is of the essence of the location; if there is no marking, there is no location. We do not cite authorities upon this proposition, because it is too well understood to require it, and because it is asserted by the plaintiffs in error in their brief.

We submit that the evidence fails to show that this alleged location was ever distinctly or at all marked on the ground. Barieau testified that he posted the notice on June 14th, 1895.

Record, page 64,

and that in the first week of January, 1896, he surveyed and marked the lines of the location.

Record, pages 65, 66.

The notice of location purported to locate this quarter section for A. Barieau and seven other persons *as an association* and as one claim. Now, on January 2nd, 1896, this location of one hundred and sixty acres was not distinctly marked upon the ground at all. Upon the contrary, eight several and distinct locations of twenty acres each were marked upon the ground to be held in severalty by eight persons, but who those persons were nowhere appears, nor was the claim of any particular person to any particular claim in any manner declared or identified. Certainly this does not meet the requirements of the law.

Upon the facts shown, was this a location of one hundred and sixty acres by an association of eight persons or were there eight locations of twenty acres each? If it was a location of one hundred and sixty acres the location was not marked upon the ground. If there were eight different locations, then there was no notice of such locations, no authority to make any such locations for or in behalf of any person, and no discovery even claimed upon more than one of the

subdivisions of the twenty acres, which subdivisions are in no manner identified.

Perhaps we have dealt at too much length with this pretended location of June 15th, 1895, and we will now take leave of it after having directed the attention of the court to the conduct of Mr. Barieau in relation thereto. This witness, who is alleged to have made the location, and upon whose sole and unsupported testimony it is hoped to sustain it, testifies that on the 30th day of December, 1896, being one day before the defendant in error, Miller and his associates made their location, he went upon the ground and made another and different location. He says: "I was on the land in question on the 30th day of December, 1896, between 2 and 3 o'clock in the afternoon. I first went to the east line of the northeast quarter. It rained some, and was blustery and showery and it rained some and the soil was a little sticky so that wherever a man went it left his track. I went to the southeast corner and found the stake and *put up a location notice for a placer mining claim for the northeast quarter of section twenty, township nineteen south, range fifteen east.*"

Record, page 66.

"The notice I posted on the southeast corner was on letter size paper, tacked on a board, and the board put on a stake about two feet above the ground and was posted so that it could be seen fifty or one hundred feet from the corner. *I had the notice recorded in the office of the recorder of the San Joaquin Mining District.*"

Record, page 66.

It is true that the rights of third parties cannot be defeated by any act of Mr. Barieau; but it is also true that this act of Mr. Barieau in attempting to make a location of the lands in

controversy while his alleged location of June 15th, 1895, still covered the same, is a commentary upon Mr. Barieau's testimony given in support of that location. Doubtless the court will have the same confidence in that location of June 15th, 1895, as was manifested by Mr. Barieau himself.

II.

The so-called abandonment executed by Miller on December 31st, 1896, not necessary to open the land to re-location, and the question of its validity is entirely immaterial.

The court finds, that, on or about the 24th day of December, 1896, A. Barieau and his alleged co-locators, made, executed and delivered to the Producers' and Consumers' Oil Company, a deed conveying to that company all the interest, claim and title to the tract of land in controversy which the said persons or any of them had, or claimed to have, and that on or about the 24th day of December, 1896, the said corporation oil company executed and delivered to E. O. Miller, one of the defendants in error, a quit claim deed, conveying and quitclaiming unto the said Miller all the right, title, claim and interest of the said oil company in and to all said lands; and that thereafter, on the 31st day of December, 1896, the said Miller, by his written declaration, abandoned, relinquished and released unto the United States of America, all right in and to said tract of land acquired by him from said Producers' and Consumers' Oil Company and its grantors.

Record, page 26.

These findings were made in response to issues tendered by defendants and intervenor, and the facts found are in support of allegations in the answer of the plaintiffs in error.

Record, pages 18, 19.

These allegations contained in the pleadings of the plaintiffs in error and intervenor were entirely immaterial and of course the findings upon the issues thereby raised are equally immaterial.

The land in controversy was open to exploration on the 31st of December, 1896, not because the so-called Barieau location alleged to have been made in June, 1895, had been abandoned, relinquished and released by any person whatever, but that the land was open to exploration and location on that day because the pretended location of June 15th, 1896, was void from the beginning and had never been in existence. That this pretended location was, in fact, a fictitious and pretended one, and void from the beginning clearly appears from the consideration hereinbefore submitted. It is therefore unnecessary to discuss the legal effect of Miller's so-called abandonment. We will only say, that we concur with counsel for plaintiffs in error in their opinion as to the nature and effect of an abandonment and of the facts necessary to constitute the same; but we disagree entirely upon the question of fact as to whether or not E. O. Miller was a successor in interest of the locators of June 15th, 1895, and of the Producers' and Consumers' Oil Company. The plaintiffs in error seek to draw from the foregoing fact the conclusion that Miller executed said abandonment for the purpose of avoiding the doing of the assessment work upon the claims for the year 1896.

It will be observed that their argument is founded upon the fact, assumed to be true by them, that Miller owned the

location of June, 1895, and the assumption that the only purpose Miller had in making the location of the 31st of December, 1897, was to avoid doing a hundred dollars assessment work. And upon this they would found the further assumption that the Barieau location of 1895 was a valid and subsisting location and that Miller knew it. These inferences are far-fetched, indeed, and, even if correctly made, would be utterly irrelevant and immaterial. The question before this court is, not whether Miller thought the Barieau location was valid or not, but whether it was, in fact, a valid and subsisting location. We think that Mr. Miller's testimony is sufficient to show his motive and to show that they were legal and proper motives. He says:

Record, page 45,

"I knew that the Producers' and Consumers' Oil Company asserted some claim to the balance of the section and that they had pretended by the record to make some kind of a location some time in 1896, but I never knew that a valid location was ever made; certain physical acts are necessary to constitute a valid location. I did not know that any location was made by Barrett and others in 1895, notwithstanding the fact that he made this quit claim deed to me. My reason for making this instrument of abandonment was that I became convinced that the Producers' and Consumers' Oil Company had abandoned the land. The original locators, if ever they did in fact locate it, made a quit claim deed to the Producers' and Consumers' Company. The Producers' and Consumers' Company would make nothing by a quit claim deed to me and delivered me the possession of the land. I was still advised, I believed then, and I still believe that the conveyances operated simply as an abandonment; they surrendered me the possession and made a quit claim

deed. The abandonment was for me from the Producers' and Consumers' Oil Company. The quit claim deed I construed as nothing more than an abandonment and regarded it as such. I abandoned it to the United States whatever there might be. I wanted to make it clear so there would be no question. I wanted to go as far as I could; if they did happen to have any possible right, I wanted to clean it up. I didn't think they had, but my purpose was, if any existed to revest the title in the government of the United States so that I could make—so the land would unquestionably be open to location December 31st, 1896, myself and my co-locators could make a valid mineral location."

And again, the witness said:

Record, page 47.

"When I took the deed from the Producers' and Consumers' Oil Company I considered it operated simply as an abandonment, surrender of possession on the part of the company. I didn't consider they had any title to convey. I didn't consider they got any title from the original locators, as I explained to you a while ago, for the reason that the locators had made quit claim deeds."

From all this it very clearly appears that Miller's motive, in taking these deeds and making this abandonment, was just and laudable. He took the deed from the Producers' and Consumers' Oil Company, not for the purpose of obtaining any right, title or interest in the claim by virtue of the deed, but simply for the purpose of avoiding any contest or claim that might thereafter be made on behalf of the company. He did not know, and did not believe, that the company had any rights in the same or could convey any, but it was a question which he could avoid by taking this quit claim deed. The

quit claim deed was made to himself individually. He had formed an association of persons consisting of himself, Hannah, Hall and five others for the purpose of locating upon that quarter section. Prudence and good faith towards his co-locators required that he should abandon any and all right to any interest in the contemplated location save and except such as he might derive through his location of the land to be made jointly with his associates. Whatever may have been the force of the abandonment between Miller and the Government of the United States, it was certainly effectual to operate between Miller and his associate locators as an estoppel.

The assumption by the plaintiffs in error that this abandonment was made for the purpose of avoiding doing a hundred dollars worth of assessment work on the claim is, in view of all the facts and of the law, somewhat amusing. There was ample time in which to perform this necessary assessment work from the 24th day of December, 1896, at which time Miller received the quit claim deed from the oil company, and, under the law, even if he had failed to complete his assessment work before December 31st, 1896, this fact would not of itself have operated to cause a forfeiture of his claim and to open the same to re-location. The statute upon the subject is as follows:

"And upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to re-location in the same manner as if no location of the same had ever been made; provided, *that the original locators, their heirs, assigns, or legal representatives have not resumed work upon the claim after such failure and before such location.*

Rev. Stat., Sec. 2344.

A resumption of work prior to re-location defeats forfeiture and prevents re-location.

Jupiter M. Co. v. Bodie C. M. Co., 11 Fed. Rep. 666.
Belk v. Meagher, 104 U. S. 279.
Lakin v. Sierra Buttes G. M. Co., 25 Fed. Rep. 337.
Belcher C. G. M. Co. v. Deferrari, 62 Cal. 162.
Farris v. Muldoon, 75 Cal. 284.
Russell v. Brosseay, 65 Cal. 605.

It is the entry by a re-locator, not mere lapse of time that destroys the right of the original owner.

Little Gunnell Mo. Co. v. Kimber, 1st Mor. Rep. 536.

In view of the fact that Miller could have saved the forfeiture of his claim under the Barieau location, if valid, by simple entry upon the land and resuming work before the 1st day of January, 1897, and was not required to complete it before that day, it will hardly be presumed that he was impelled to make the written abandonment of December 29th by a desire to save the claim from forfeiture. Rather will it be believed that he was impelled to make the same because he felt that he had no rights under the location and in justice to his proposed co-locators.

Furthermore, it is to be observed that the Court finds, as a fact, that the abandonment was in *good faith*.

Record, pp. 29, 30.

III.

The location made by E. O. Miller and others on December 31st, 1896, was made in strict compliance with all of the requirements of the law and is now a valid and subsisting location on all of the lands described in the complaint of the defendants in error.

We submit that the observations hereinbefore submitted are sufficient to show that on the 31st day of December, 1896, the land mentioned in the complaint of the defendants in error was unoccupied and unappropriated public land of the United States. We are now to show, that, on that day, E. O. Miller, W. F. Hall, L. E. Hall, R. B. Biddle, J. A. Hannah, D. J. Overall, Harry Levison and Charles H. Smith, an association of persons, entered and occupied that land and made a valid location thereof, under the mineral laws of the United States, in strict compliance to the requirements of those laws.

We are pleased that we are able to concur with counsel for plaintiffs in error that as a matter of strict law, in the absence of a State or local regulation or local customs at the time of making the location, the posting of a notice or the recording of the same is not necessary.

Lindley on Mines and Mining, Sec. 432.
Book v. Justice M. Co., 58 Fed. Rep. 120.
Sutter v. McGuire, 78 Cal. 543.
Thompson v. Spray, 72 Cal. 533.

At that time there was no State law and there is no evidence of any local regulation or custom requiring it. But Miller and his co-locators did both of these things.

Record, page 39.

That these things were done was found by the court, and

is not disputed by plaintiffs in error, and the fact that they were done shows the absolute good faith of the locators of said claim.

We agree with plaintiffs in error that it is absolutely necessary to the validity of every location upon the mineral lands of the United States that it should be marked on the ground, so that its boundaries can be readily traced, and we cannot restrain the expression of our surprise that counsel should think it necessary to cite authorities in support of a rule so fundamental in its character as to be universally understood. In making their location of December 31st, 1896, Miller and his co-locators fully complied with this requirement of the law, for they did mark the boundaries of their location on the ground so that the same could be readily traced. The court so finds.

Record, page 23.

And the evidence is amply sufficient to support the finding. The witness, Miller, testified:

"I inquired either from Captain Barrett or Judge Poston, or some one at the house, where the northwest corner of this quarter section was; they showed me from the house where we were and I went over there and found some rocks; I gathered up the rocks that were there and erected a rock monument. In the center of that rock pile I placed a stake about two feet long, upon which there was a board about a foot long and ten inches wide, and I tacked my location notice on that; that is at the northwest corner of this quarter section, the northwest corner of the northeast quarter. After posting this notice on the northwest corner I went east one-half a mile to the northeast corner of this quarter section. There I found what I thought was about the right place for a corner, and I gathered up some rock that was there in a pile, erected a rock monu-

ment, in which I put a stake about two feet long and about an inch thick; this rock monument was about eighteen inches high and in which I put a stake about two feet long. From that corner I went south half a mile to the southeast corner of this quarter section; there I found what I was satisfied had been a corner previous. I gathered up the rock that were there and piled them and erected another rock monument about eighteen inches high; I did nothing else at this corner. From there I went west a little piece and then I went diagonally across the quarter section and went back over to the cabin at Oil City where I stayed the night before. On the north line of this quarter section, and on the east and on a part of the way on the south line, there was a line of stakes that had been previously put there and I erected no intermediate monument because these stakes that were already there marked the boundaries plainly and clearly; these intermediate stakes were pegs probably five or six inches long and some probably a foot long and about ten or twelve to the half mile. The small stakes were on the line between the corners established by me. I made no survey of the land and had no surveyor with me and they appeared to my eye to be on the line; and since that time I have taken a surveyor there and showed him, to demonstrate whether or not the monuments I then erected were upon the government's sub-divisions and corners. I took the surveyor of Fresno county and showed him the corners I erected and he made a survey and verified it."

Record, pages 40, 41.

W. Hall, one of the locators, testified:

"I am acquainted with that quarter section and was on a portion of it 31st day of December, 1896. * * * While I was there I put up a monument on the southwest corner of this same northeast quarter, a stake; I erected it at the south-

west corner of the northeast quarter which is the center of the section; I put up a rock monument there, probably eighteen inches high. A pile of rock built up of small rock and put a stake up there. My intention in making that monument, my idea was to make a mineral location on that quarter section in connection with E. O. Miller, the plaintiff in this case, and with other parties named as locators on that notice."

Record, page 55.

Geo. L. Hoxie, county surveyor of the county, testified that he was on the quarter section on April 29th, 1899, and then saw the monuments and stakes deposed to by Miller and Hall and that the line of stakes was quite plain.

Record, page 51.

We have quoted only a part of the evidence bearing upon the acts done in marking the boundaries by defendant in error, Miller, and his co-locators on December 31st, 1896. Indeed, we do not understand that plaintiffs in error deny that the monuments and stakes and location notice were placed upon the land as testified by Miller and Hall and that the intervening stakes were on the boundary lines of the quarter section. We understand their contention to be that as a matter of law these were not sufficient. We think they were sufficient and more than sufficient. Let it be remembered that this is a placer claim, located according to the legal sub-divisions of the United States survey, and that the notice of location posted at the northwest corner of the quarter section purported by its terms to locate the entire quarter section and that these corner stakes and monuments were at the corners of the quarter section and the smaller stakes between those corners.

Whether or not a location is so marked on the ground

that its boundaries can be readily ascertained is a question of fact for the determination of the jury.

Taylor v. Middleton, 62 Cal. 656.
Anderson v. Black, 70 Cal. 226.
Eilers v. Botman, 111 U. S. 356.
DuPrat v. James, 65 Cal. 555.
Lindley on Mines and Mining, Sec. 373.

In this case the court has found that the location was distinctly marked upon the ground so that its boundaries could be readily traced. It is now too late for the plaintiffs in error to attack that finding. We content ourselves by citing a few of the very great number of authorities which show the sufficiency of the location.

Duprat v. James, 65 Cal. 555, *supra.*
Howeth v. Sullinger, 113 Cal. 347.
Jupiter Mining Co. v. Bodie Con. M. Co., 11 Fed. Rep. 667-677.
Lindley on Mines and Mining, Sec. 373.

We further assert that all of the persons named as locators in the location made December 31st, 1896, were bona-fide locators and said location was made for the benefit of all of them.

Plaintiffs in error see fit to attack the location under which defendants in error claim, upon the ground that it was in fact made by Miller, Hall and Hannah, and claim that they were the only bona fide locators out of the eight persons named in the location, and that the other five were mere dummies.

As a matter of law, we deny the right of these plaintiffs in error to attack this location or any location upon that ground. The location segregated the land from the public domain of the United States and while it existed prevented any other

locations upon the land. Whether or not that location was fraudulent, is a question that can be raised only by the Government of the United States, and is a question with which plaintiffs in error have nothing to do. The cases cited by plaintiffs in error, so far from sustaining their position, show that we are correct in this statement of the law, but the contention of plaintiffs in error is so exceedingly far fetched, and is so utterly without foundation in the evidence, that, waiving all questions of law, we prefer to meet them upon the fact.

The court finds that this location was made by all of the persons named in the notice of location as an association of persons and for the benefit of such association,

Record page 30,

and the court further finds that all of plaintiffs' in error allegations of fraud and collusion and conspiracy are untrue.

And the evidence is ample to sustain the findings.

Record, pages 30, 31, 32.

The record further shows that Harry Levison, D. G. Overall and Charles Smith, three of those alleged dummy locators, were in attendance upon the court and were sworn as witnesses at the trial, and yet the plaintiffs in error made no effort by their testimony to establish the utterly unreasonable allegations of their complaint. Without further discussion we submit that the evidence shows that these locators formed an association for the purpose of making this location and that the location was made with the knowledge and consent of each and all of them and for their joint benefit.

Mitchell v. Cline, 84 Cal. 409, cited by plaintiffs in error, is entirely beside the question. This was a case where the names of certain persons were used as locators in their ab-

sence, without their knowledge or consent and avowedly not for their benefit but for the benefit of others, and in pursuance of an agreement made between the persons actually making the location, that the names of these dummy locators should be used, not for their own benefit but for the benefit of the persons using them.

Durrant v. Corbin, 94 Fed. Rep. 382, also cited by plaintiffs in error, was a case where the court found as facts upon the testimony of the party claiming under the location, that the locators were either employes or friends of the party claiming under the location and that they had nothing whatever to do with the making of such location and that the defendant simply used their names as locators in the expectation that they would afterwards convey whatever colorable rights that might be acquired in their name to him without consideration.

Cases, such as above, can give little assistance in deciding a case such as this, where the court finds and the evidence shows all the facts to be directly opposed to any of the facts upon which said cases were decided.

We also assert that the location of December 31st, 1896, under which defendants in error claim, is based upon a discovery made before the rights of any other persons attached to the property.

The court finds that the defendants in error have dug, bored and excavated for petroleum and other fluid products and have expended in such work the sum of more than thirty thousand dollars, and by means thereof have discovered large quantities of petroleum on said property, and that there now exists and did exist at the commencement of this action wells of great depth upon said property, sunk and excavated by the Home Oil Company in which there is a daily flow of large quantities of petroleum of great value.

The evidence shows that the first well was completed and petroleum found therein in July, 1897, as the result of the large expenditure of money and of several months of labor by The Home Oil Company. We understand that plaintiffs in error do not question the fact that this work was performed, money expended and petroleum discovered. We also understand that they do not controvert the legal proposition that if this discovery was made before the rights of others attached to the property, that it is a discovery sufficient to meet all of the requirements of the law and support the location of December 31st, 1896, under which plaintiffs claim.

The locations of the plaintiffs in error are invalid.

We submit that the foregoing observations are sufficient to show that on the 31st day of December, 1896, the land in controversy was public mineral land of the United States, unappropriated and open to exploration and occupation; that on that day E. O. Miller and his seven co-locators made a location of all of said lands under the mining laws of the United States by posting a proper and sufficient notice of location and thereafter recording the same and by distinctly marking the location on the ground so that its boundaries could be readily traced; and that thereafter, and by July, 1897, very large and valuable discoveries of mineral were made upon various parts of said mining claim by the defendants in error after the expenditure of many thousands of dollars.

After the labor, enterprise and expenditure of defendants in error have demonstated the great value of the property, plaintiffs in error now seek to defeat their rights and to deprive them of their just reward upon the ground that after the posting of the notice and the marking of the boundaries on the 31st day of December, 1896, and before the discovery

of petroleum in July, 1897, they, the plaintiffs in error had also marked the boundaries and had made a discovery of petroleum upon the lands claimed by them.

A question of fact was here squarely presented for the determination of the court below, and that court has as squarely found and declared that the plaintiffs in error never at any time made any discovery of any mineral oil upon any part of said land.

Record, page 25.

A reading of the testimony will show that this finding of the court is amply sustained by the testimony and that this alleged discovery made by the plaintiffs in error was a pretended, false and fictitious discovery. We say that it was false, pretended and fictitious, because if the facts alleged in support thereof are taken to be true, those facts under the law are entirely insufficient to support the requirements that a discovery must be made and because we are of the opinion that a reading of the transcript will show that the facts alleged by plaintiffs in error in support of their claim of discovery have not been established to the satisfaction of the judicial mind.

In a former part of this brief, and in discussing Barieau's alleged discovery, claimed in support of his location of June, 1895, we had occasion to discuss the law bearing upon the matter of discovery and to cite many authorities upon the question. The discovery claimed by the plaintiffs in error is in many respects similar to the discovery claimed by Barieau and is equally vague and visionary.

We respectfully refer the court to that portion of our brief for a discussion of the matters of law connected with this pretended discovery of the defendants; we shall here meet the plaintiffs in error directly upon the questions of fact.

The plaintiffs in error do not say in their answer that they discovered petroleum. The allegation is that they discovered a "seepage of petroleum."

Record, page 11.

At the trial, A. Y. Chrisman, one of the plaintiffs in error, testified as follows:

"Before placing the notice there—mining location—I made an examination as to the presence of any petroleum or oil on these two claims nearing the east line of the northeast quarter; there is a little gulch there and there is a little oil seeps out with the water and comes out at the gulch there; in relation to my boy's claims, that would be just inside the southeast corner of his claim, would be on his claim. I made a discovery on my claim near the north line inside of my claim in January, 1897, after I had posted the notice; before I posted my notice I noticed strong evidences of oil there on my claim, black shale cropping out in places."

Record, page 82.

H. T. Chrisman, the other defendant, testified as follows:

"I discovered oil there before this time; I was there prospecting; there was a stream of water there oozing out in different places; the first time I became acquainted with it was in December, 1896; I saw the spring about twice between the 1st of December and the 1st of January; I saw it that time on December 31st; along the gulch there in several places water coming out in two places, this oil was on it. I was somewhat acquainted with the oil they were getting over there and around there in different places in the mountains; it had considerable resemblance and in fact was that and I called it oil; I did not see much, the pools it was on covered."

Record, page 78.

And this was the only discovery made by these defendants and this is the only evidence in its support.

No one ever saw or heard of this alleged discovery of the plaintiffs in error, except the plaintiffs in error themselves, and it does not appear that they ever saw the oil discovered except upon the one occasion when it was discovered by them. Upon the other hand, C. A. Canfield, W. F. Chandler, I. F. Poston, and E. L. Doheny were sworn as witnesses, and it appeared that they were all perfectly familiar with the land in controversy and with the particular point where the witness, H. T. Chrisman, stated that he had made his discovery. And they all testified that they had examined the same for the express purpose of ascertaining any evidences of oil and they testified "that there was none at all, absolutely none."

Record, pages 96-99.

Upon the law and the facts we imagine that it will be an exceedingly difficult undertaking for the plaintiffs in error to successfully attack the finding of the court that they never at any time made any discovery upon the disputed territory.

Reference is made in the brief on behalf of the plaintiffs in error, and also, in the decision of the Supreme Court, to the case of Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, where, as was said by our Supreme Court: "The Circuit Court was dealing with this precise question in regard to this precise land under these identical circumstances."

That was a suit brought against these defendants in error in the Circuit Court of the United States in and for the Ninth Judicial District, Southern Division, where the complainant sought to wrest the entire quarter section from these defendants in error, asserting that the Miller location was invalid, and that the location under which it claimed was prior in right. We recommend it to the careful consideration

of this court as it deals with the exact land in controversy, and the matter was given exhaustive consideration by Ross, Circuit Judge. In the course of his decision, he says:

"The bill alleges that at the time of the posting of the notice of location of January 1, 1896, Wilson discovered seepages of oil on the land in question, as well as oil sand and shale, but there is no showing in the proof that he discovered any seepages of oil in it. On the contrary, I think the evidence shows beyond any doubt that there never were any seepages of oil on that quarter section of land. There is evidence on the part of the complainant going to show that Wilson discovered sandstone and shale thereon, as well as on adjoining lands, and that there were seepages of oil on some of the adjoining lands, as also wells on one of the adjoining tracts, which were producing more or less oil. But these were nothing more than indications of oil under the surface of the ground in question, which might or might not prove to be true. Mere indications, however strong, are not, in my opinion, sufficient to answer the requirements of the statute, which requires, as one of the essential conditions to the making of a valid location of unappropriated public land of the United States under the mining laws, a discovery of mineral within the limits of the claim. Rev. Stat., Secs. 2320, 2329; Mining Co. v. Doe (C.C.), 56 Fed. 685. Indications of the existence of a thing is not the thing itself. * * *

"What has been said in respect to the absence of any discovery of mineral by Wilson on January 1, 1896, equally applies to his pretended location of January 1, 1893, and to Barrett's pretended location of the same ground in 1895, under whom the defendants claim. Barrett, during the year 1895, undertook to transfer his right to the ground in question, which had no existence in fact or law, to the Producers' &

Consumers' Oil Company, which company later undertook to transfer the same thing (which was nothing) to the defendant, Miller, and on December 31, 1896, Miller undertook to relinquish to the United States what he did not have, namely, a right to the land in question, and immediately thereafter, to wit, on the 31st day of December, 1896, without having made any discovery of mineral upon the land, undertook to locate the quarter section in question under the mining laws, for himself and seven other persons, by posting the required notice and marking the boundaries. Shortly thereafter he undertook to confer upon Barrett the right to enter upon and explore for and develop oil upon the claim, and to dispose of the oil there found. Barrett thereupon went into actual possession of the land and early in 1897 erected a derrick thereon, and commenced boring for oil, and shortly thereafter transferred, with the consent of Miller, whatever rights he acquired from him to the defendant, Home Oil Company, which company proceeded with the boring, and in October and November, 1897, at a depth of about 800 feet, actually discovered oil in the ground, since which time it has remained in the actual possession of the claim, and bored several other wells, several of which proved to be flowing wells, and in the aggregate yield a large quantity of oil. It would thus seem that the location made by Miller and his associates on the 31st day of December, 1896, was properly marked upon the ground, and the notice of location properly posted, followed, as it was, by the actual possession of the ground by those claiming under it, and by the actual discovery of mineral within the limits of the claim by them, the requirements of the United States statute in respect to the location of mineral land were answered, no rights of any third party having in the meantime intervened."

It is true that, in discussing the question of the discovery, the Supreme Court of the State of California, in its decision, and solely for the purpose of the argument, and for the purpose of making the position of these plaintiffs in error as strong as possible, assumed the existence of the seepage testified to by them, although the fact is, and the record so shows, that these plaintiffs in error never discovered even a seepage of petroleum or other mineral oil within the boundaries of their respective claims.

Record, page 25.

A large portion of the brief presented on behalf of the plaintiffs in error is devoted to the consideration of the question as to whether a seepage is a discovery of mineral and their contention is based upon the assumption, as are many other of the arguments of counsel, that it appears from the record, and is a fact, that the plaintiffs in error discovered, within the boundaries of their respective claims, a seepage of oil. As we have shown, many witnesses testified that no seepage of oil ever existed at any place within the boundaries of the quarter section, and the court found, *as a fact,* that no discovery was ever made by plaintiffs in error, so that a discussion as to what constitutes a discovery is inappropriate and presents but a moot and academic question, in view of the finding of the lower court, that not even a *seepage* of oil was ever discovered.

Thus far we have discussed the questions presented upon the theory that the findings of the court show that the mineral location under which these defendants in error claim was a valid location, and the attempted locations of the plaintiffs in error were invalid. One other view presents itself, which, in our opinion, is determinative of the merits of this controversy, and that is that the possessory title of the defendants in

error, whether or not based upon a valid location, was sufficient to support the judgment of the courts as against any asserted claims of these plaintiffs in error.

The facts upon which this case is to be decided are: that E. O. Miller was the owner of the property,

Record, page 39.

That the Home Oil Company was the lessee of the property, claiming title under the defendant in error, E. O. Miller, and *"at the commencement of this action, ever since has been, and now is in the actual possession of the same and every part thereof."*

Record page 22.

That the Home Oil Company on the 17th day of September, 1897, obtained a lease of the property in controversy, and on that went into the possession of all the same under and by virtue of said lease and *"ever since have been, and now is in the exclusive possession of all of the same and every part thereof."*

Record, page 23.

That the alleged locations of plaintiffs in error were made shortly after midnight on the 1st day of January, 1897.

Record, pages 78, 80.

That, at that time, no part of said quarter section was vacant, but that the whole of the same was then in the actual possession of E. O. Miller and his co-locators, and that the plaintiffs in error did not make their location in good faith, and that they never did or performed any work or labor thereon as required by the laws of the United States, or the State of California, and that neither of the plaintiffs in error

ever discovered any seepage of petroleum or mineral oil on their respective claims.

Record, page 25.

Such being the facts our contention upon that branch of the case is that these plaintiffs in error were trespassers, and no right was initiated in their behalf by their intrusion at midnight upon the possession of these prior locators, under whom the defendants in error claim, and being trespassers, the actual possession of the defendants in error was sufficient in law to entitle them to a judgment.

In the case of Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 732, it was stated:

"Unless some reason is shown not found in this record these were the persons entitled to make preemption, and no one else. But suppose they were not. Does the policy of the pre-emption law authorize a stranger to thrust these men out of their homes, seize their improvements and settle exactly where they settled, and by these acts acquire the initiatory right of pre-emption? The generosity by which Congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make their improvements on unimproved land; and it would have shocked the moral sense of the men who passed these laws, if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicides and other crimes of less turpitude." * * * "It follows that the de-

fendants could not have made any lawful entry on the lands where the hay was cut in this case; that no law existed which gave them any right to make such an entry; that they were *mere naked trespassers* making an unwarranted intrusion upon the enclosure of another; an enclosure and occupation of years, on which time, and labor and money had been expended; and that in such a wrongful attempt to seize the fruits of other men's labor there could be no bona fide claim of right whatever. The instruction of the court that this could be done, founded on an erroneous view of the pre-emption law, was itself erroneous and the judgment founded on it must be reversed."

In the case of Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. Rep. 673, *supra*, Judge Ross said:

"It is true that upon mineral land of the United States, upon which there is no valid existing location, any competent locator may enter, even if it is in the actual possession of another, provided he can do so peaceably and in good faith, in order to initiate a location for himself; but no right upon any government land, whether mineral or agricultural, which is in the actual possession of another, can be initiated by a forcible, fraudulent, surreptitious, or clandestine entry thereon. Such entry must be open and above board and made in good faith. Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735; Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 372. One who is in the actual possession of a mining claim, working it for the mineral it contains, and claiming it under the laws of the United States, whether the location under which he so claims is valid or invalid, cannot be forcibly, surreptitiously, clandestinely, or otherwise fraudulently intruded upon or ousted while he is asleep in his cabin, or temporarily absent

from his cabin. I think it clear from the showing made upon the hearing of this application: First, that Jackson did not make any such open and good faith entry upon the actual possession of the defendants of the quarter section in question, upon which he could initiate any valid location thereof under the mining laws."

In the case of Cowell v. Lammers, 21 Fed. 200, it appeared that one McCarty, the manager of the plaintiff, was in the actual possession and occupation of certain land having it under fence and in actual use; that the defendant, by permission of the plaintiff, had erected a cabin on a portion of the lands of the plaintiff other than that part upon which the trespass is alleged to have been committed. That thereafter, the defendant, without the consent and against the will of plaintiff, entered upon the portion involved in the action, assuming it to be public mineral land, and located a mining claim thereon. It will be seen that there was no force or fraud of any kind exercised, but that the mining location was made against the will and without the consent of the plaintiff.

In discussing the question the Court says:

"The complainant insists that, in view of the indisputable facts appearing in the case, the defendant is not in a position which entitles him, in this proceeding to collaterally assail the validity of his title under the patent for two reasons; and, if I rightly comprehend the decisions of the Supreme Court upon similar questions, he is clearly right in this position. In Atherton v. Fowler the Supreme Court distinctly held that no right of pre-emption can be established by a settlement and improvement on a tract of land conceded to the public, where the pre-emption claimant intruded upon the actual possession of another, who, having no other valid title than

possession, had already settled upon, inclosed, and improved the tract, that such an intrusion is but a naked, unlawful trespass, and cannot initiate a right of pre-emption. (96 U. S. 513.) This decision was affirmed in Hosmer v. Wallace, 97 U. S. 759, and Quinby v. Conlan, 104 U. S. 421. In the latter case the court says: 'A settlement cannot be made upon land already occupied; as against existing occupants, the settlement of another is ineffectual to establish a pre-emption right. Such is the purport of our decisions in Atherton v. Fowler, 96 U. S. 513, and Hosmer v. Wallace, 97 U. S. 575; 104 U. S. 423. The laws no more authorize a trespass upon the actual possession and occupation of another, for the purpose of initiating a pre-emption right to take up and acquire under the statutes the title to a piece of mineral land, than to initiate an ordinary pre-emption right to a tract of agricultural land. The law does not encourage or permit, for any purpose, unlawful intrusions and trespasses upon the actual possession and occupation of another. To permit a right or confer authority to thus initiate a title to the public land, would be to encourage strife, breaches of the peace, and violence of such a character as to greatly disturb the public tranquility. We are, fortunately, not without painful examples of this kind in this state. Actual possession and occupation of lands in good faith, public or otherwise, have always, as against naked trespassers, been regarded as evidence of title, and fully protected by the courts of this state from its first settlement. In this case the defendant intruded upon the actual possession and occupation of the complainant, prospected for and located a supposed mine upon lands which had been inclosed with a substantial fence and in the actual possession, occupation, and use of the complainant and his immediate grantor for eight years, claiming title under a patent of the United States, reg-

ularly issued fourteen years before. He is a mere stranger and trespasser upon the actual possession and occupation of the complainant, without any right recognized by the law of the land, and is not in a position to assail the complainant's title. If this is not the rule established by the decisions of the Supreme Court, then I am unable to comprehend their import. See also Doll v. Meador, 16 Cal. 320, et seq."

In the case of Crossman v. Pendery, 8 Fed. 693, it appeared that the case was submitted upon an agreed state of facts to the effect that the ground in controversy was covered by two locations, both regular in form. That the Orion claim was first surveyed, located and staked, and that the locators had steadily prosecuted work in the development thereof, and had discovered mineral in several places. That the other location was made subsequent to the Orion and while the locators of the latter were in possession thereof, and that under the second location mineral was discovered and before the discovery of the locator of the Orion.

Justice Miller, after stating the facts, proceeds:

"The question submitted to the court is this: Can prospectors on the public mineral domain acquire any right in which the law will protect them prior to the discovery of mineral in rock in place? And, if so, can plaintiffs, being prior locators, recover against defendants, who first discovered mineral on the ground in controversy? It is the opinion of the Court that inasmuch as the plaintiffs allowed defendants to enter upon their claim and within their boundaries and there sink a shaft, in which they discovered mineral in rock in place before a discovery by plaintiffs, and made location thereof, without protest, the defendants now have a better right. But the plaintiffs might have protected their actual possession of

their entire claim by proper legal proceedings prior to the discovery by the defendants, or by either party. A prospector on the public mineral domain may protect himself in the possession of his pedis possession while he is searching for mineral. His possession so held is good as a possessory title against all the world, except the Government of the United States. But if he stands by and allows others to enter upon his claim and first discover mineral in rock in place, the law gives such discoverer a title to the mineral first discovered, against which a mere possession of surface cannot prevail, and in this case judgment must be for the defendants."

In the very late case of Tarpey v. Madsen, 178 U. S. 215, 44 L. ed. 1042, Justice Brewer said:

"It must be remembered that mere occupation of the public lands gives no right as against the government. It is a matter of common knowledge that many go over the public domain, build cabins and establish themselves temporarily, at least as occupants. * * * Such occupation is often accompanied by buildings and enclosures for housing and care of stock. * * * These occupants are not in the eye of the law considered as technically trespassers. No individual can interfere with their possession or compel them to leave. Their possessory rights are recognized as of value and may be subjects of barter and sale. * * * In this respect we must notice the oft-repeated declaration of this Court, that 'the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereof.' Ard. v. Brandon, 156 U. S. 537, 543, 39 L. ed. 523, 526, 15 Sup. Ct. Rep. 406; Northern P. R. Co. v. Amacker, 175 U. S. 564, 567, *ante* 274, 275, 20 Sup. Ct. Rep. 236."

In the case of Pacific L. & I. Co. v. Elwood Oil Co. 112 Fed. 4, Judge Hawley, of the United States Circuit Court of Appeals, said:

"The contention of appellant would, if its doctrines were to prevail, lead to results which are denounced in Atherton v. Fowler, 96 U. S. 513, 513, as being antagonistic to the true intent and meaning of the pre-emption laws. In that case it was held that the right to make a settlement is only to be exercised on unsettled lands; that the right to make improvements is to be exercised on unimproved lands; that the right to erect a dwellinghouse is to be exercised only on vacant land, and that none of these things can be done on land when it is occupied and used by others.

"No right can be initiated on government land which is in the actual possession of another by forcible, fraudulent or clandestine entry thereon. Cowell v. Lammers, 21 Fed. 200, 202; Nevada-Sierra Oil Co. v. Home Oil Co., 98 Fed. 674, 680; Hosmer v. Wallace, 97 U. S. 575, 579; Tremouth v. San Francisco, 100 U. S. 251; Mower v. Fletcher, 166 U. S. 380, 385-6; Haws v. Victoria Copper M. Co. 160 U. S. 303, 317; Nickals v. Winn, 17 Nev. 188, 193; McBrown v. Morris, 59 Cal. 64, 72; Goodwin v. McCabe, 75 Cal. 584, 588; Rourke v. McNally, 98 Cal. 291.

"The decisions upon this point are not all confined to cases where the entry is forcible, although in such cases the courts did not discuss the question whether the same principles would apply to cases of an entry upon lands in the actual possession of another, without the use of force.

"In Quinby v. Conlan, 104 U. S. 420, 423, the element of force is not shown to have existed and it is not adverted to in the opinion. The Court said: 'A settlement cannot be made upon public land already occupied; as against exist-

ing occupants, the settlement of another is ineffectual to establish a pre-emptive right. Such is the purport of our decision in Atherton v. Fowler, 96 U. S. 513, and Hosmer v. Wallace, 79 id. 575.'

"In Goodwin v. McCabe, *supra*, the Court said: 'If the plaintiff was in the actual possession of the land, we think the defendant's proceedings were invalid, although his entry was accomplished without the use of force. This seems to be the result of the authorities. * * * The reasoning of the court in all cases seems to us to forbid the invasion of the actual possession of another, whether such invasion is accomplished by the use of force or not.'

"In Gird v. California Oil Co., 60 Fed. 531, 545, this principle is recognized. The Court said: 'If Irland was in the actual possession, and working the ground for himself, and Barfield, Henley and Thompson were acting for themselves in making the location of the Razzle Dazzle on December 6, 1890, the location so made by them would be void, because in that event, the location would have been made upon ground not vacant, and open to location, but upon ground in the actual and adverse occupancy of another.'

"Having arrived at the conclusion, from the facts stated in the bill of complaint and the principles of law applicable thereto, that the lands selected by the grantor of appellant were not, at the time of such selection, 'vacant land open to settlement,' it is unnecessary to review the many other questions which were elaborately argued by the learned counsel.

"It necessarily follows, from the views we have expressed, that the bill of complaint does not state any cause of action entitling appellant to any relief against the defendants. The Court did not, therefore, err in sustaining the demurrer and dimissing the bill."

The same rule has been established by various decisions of our state Court. In the case of Davis v. Scott, 56 Cal. 165, the syllabus is as follows:

"The right of pre-emption under the laws of the United States cannot be acquired by intrusion and trespass upon lands in the actual possession of others. The Justice, Morrison, in referring to the case of Atherton v. Fowler, *supra*, quotes the decision of Justice Miller with approval, saying, among other things, 'The defendant, having made an ineffectual attempt to pre-empt the land in controversy, invaded the plaintiff's possession, and now withholds the possession from him. It is impossible for us to perceive any just claim or right which the defendant can assert in support of his entry. He did not have a pre-emption claim to the land, or to any portion thereof, and could not, under the highest authority of law, become a pre-emptioner thereof. The land was in the actual possession and occupation of the plaintiff at the time the defendant attempted to locate a pre-emption claim thereon, and it was not, therefore, subject to pre-emption.'"

A later case is that of McBrown v. Morris, 59 Cal. 64. The opinion was written by Thornton, and concurred in by McKinstry and Ross, and reaffirms the case of Atherton against Fowler, and other decisions of this state and of the United States. It appeared in that case that at the time of the entry complained of, the plaintiff was in actual possession of the land, and used the same for dairy and other purposes, and that the main question presented was whether the defendant could initiate a right by entering and settling upon the land within the inclosure of and occupancy and possession of another without his consent and against his express prohibition.

In part, Judge Thornton says:

"The right to make a settlement was to be exercised on unsettled land, and to make improvements on unimproved land. * * * It would have shocked the moral sense of the men who passed these laws if they had supposed that they had extended an invitation to the pioneer population to acquire any inchoate rights to the public land by trespass. That the entry of defendant as expressly found was made without the consent of plaintiff, or his tenants, and against their wish, and he was forbidden to make such entry by them. The findings of fact bring this case within the determination of the cases cited. * * * That such an intrusion, though made under pretense of pre-empting the lands is but an unlawful trespass and cannot initiate a right of pre-emption."

In the case of Rourke v. McNally, 98 Cal. 291, the court says:

"Since she entered into the actual possession of another, it is no moment that her entry was peaceable, because made in the presence of plaintiff. * * * Until she has acquired some such right or connected herself in some lawful mode with the true title, she cannot resist the presumption of title in the plaintiff which arises from the fact of his prior possession. The laws of the United States do not authorize an entry upon the actual possession of another for the purpose of making a settlement, though made by one qualified to purchase from the government to acquire such a homestead, although such entry is made with the intent to acquire the title in some lawful mode. (Atherton v. Fowler, 96 U. S. 513; Dunwood v. Martin, 120 U. S. 369; Quinby v. Conol, 104 U. S. 381; McBrown v. Morris, 59 Cal. 68; Goodwin v. McCabe, 75 Cal. 584; Bullock v. Rouse, 81 Cal. 590; Peterson v. Kinkead, 92 Cal. 372.)"

In the case of McGuire v. Brown, 106 Cal. 660, it is said:

"Our conclusion is supported by analogy also with the rule for many years enforced both in the federal courts and the courts of this state, that the right of property which the laws of Congress allow to be acquired on the public domain shall not be initiated by trespass and intrusion on the actual possession of a prior occupant. (McBrown v. Morris, 59 Cal. 64; Goodwin v. McCabe, 75 Cal. 588, and cases cited.)"

In the case of Phoenix M. & M. Co. v. Lawrence, 55 Cal. 143, it is said:

"The only issuable question was really the intention with which the defendants entered. They claimed in their answer that they entered in good faith, believing that the ground was vacant, and subject to location according to the mining laws. But a person who knows that a mining claim is in the actual possession of another cannot honestly believe that it is vacant, and subject to entry and relocation; and the entry under such circumstances cannot be made in good faith, unless it is made upon some right, or color of right, or claim of legal right, to make the entry. Such a claim of right must exist before the entry, to constitute good faith in making the entry. If it does not exist, the entry is made without right or color of title, and is an entry in bad faith; for actual possession in another is prima facie evidence of title in the possessor, and is protected by the law against lawless invasion without right or color of right." * * *

"But the defendants offer no evidence of right or title. They knew that the mine was in the possession of the plaintiff and that half a million of dollars had been expended on it; and they admit that they entered upon it, not upon the faith of any title or right in themselves, but to take advantage of what

they supposed to be a defect in the title of plaintiff. * * * It is apparent that the defendants, by their own testimony, did not enter upon the mine under any title or claim of right which they had to the mine. They entered only because they believed or suspected, that the plaintiff's claim of title was defective. After their entry without right or color of title, they went through the forms of making a location, and posted a notice thereon, which they caused to be filed in the Recorder's office of the district."

In the early case of Attwood v. Fricot, 17 Cal. 43, the Court says:

"We are inclined to think that some of the instructions given at the instance of the defendant, whether correct or not, as abstract propositions applicable to real estate, had a tendency to mislead the jury when applied to the facts of the record. Mining claims are held by possession, but that possession is regulated and defined by usage and local, conventional rules, and the 'actual possession' which is applied to agricultural lands, and which is understood to be a *possessio pedis*, can scarcely be acquired in a mining claim in order to give a right of action for the invasion of it. The claim must be in some way defined as to limits, of course, before the possession of or working upon part gives possession to any more than that part so possessed or worked. But when the claim is defined, and the party enters in pursuance of the mining rules and customs, the possession of part is the possession of the entire claim. And so if a party enters bona fide under color of a title, as under a deed or lease, the possession of a part against any one but the true owner or prior occupant is the possession of the entire claim described by the paper; and this though the paper did not convey the title. The condition of

the possessor, in such instances, would not be worse than that of the occupant of other real estate, in which case the rule applies. A third person would have no right to invade the possession of the party taking it under such circumstances, and set up, as against him, outstanding title in a stranger, with which he had no connection. This principle does not touch the case of an entry into possession in pursuance of mining rules and regulations, as for a forfeiture or abandonment, etc.; but the case we suppose is of a possession taken independently of such rules."

Again, in the great case of English v. Johnson, 17 Cal. p. 108, which is more largely cited, perhaps, than any other case in the books, upon this subject, the Court takes occasion to say:

"The Court charged the jury, in effect, that possession taken, without reference to mining rules, of a mining claim was sufficient, as against one entering by no better title, to maintain an action; and further, that this possession need not be further evidenced by actual inclosures, but 'if the ground was included within distinct, visible, and notorious boundaries, and if the plaintiffs were working a portion of the ground within those boundaries,' this was enough as against any one entering without title. We see no objection to this ruling. In the late cases of Atwood v. Fricot, et al., *ante* 37, we lay down some rules on this general subject. The taking up of mineral land in pursuance of the mining regulations of the vicinage gives possessory title to the claims, just as an entry in the land office, or the following of prescribed rules given by statute, gives a possessory title to public or agricultural land. But it does not follow, because this is the regular or usual way of obtaining possession, that a possession not so obtained would necessarily

be without the protection of the law. Possession not taken in pursuance of these rules would still be good as against one not taking possession in accordance with the rules of the vicinage, but merely coming upon the premises in the same manner as the prior possessor. The actual prior possession of the first occupant would be better than the subsequent possession of the last.

"The question arises as to the extent of the possession of the first taker, and the rules which determine this question. In mining claims we require no other acts, as evidence of possession, than those usually exercised by the owners of such claims. A miner is not expected to reside upon his claim, nor to build upon it, nor to cultivate the ground, nor to inclose it. The claim is usually of a small strip of land compared with the extent of ground generally taken up for agricultural purposes. Its only value is in working it and extracting minerals. A party may be in possession by himself, or by his agents or servants. Going on the land to work it, or even work done in proximity and in direct relation to the claim, for the purpose of extracting, or preparing to extract minerals from it—as, for example, starting a tunnel a considerable distance off to run into the claim—would be a possession of the claim within the meaning of the rule. If, as was held in the case of Attwood v. Fricot, et al., the party entered under written claim or color of title, his possession except as against the true owner or a prior occupant, would be good to the extent of the whole limits described in the paper, though the possession be only of a part of the claim. In this case, it seems the plaintiffs took up, in connection with others, these claims sued for, marking and defining, in the way usual among miners, the limits; and also bought out the interest of two of their associates, original appropriators. But we think where a claim is distinctly defined

by physical marks, that possession taken for mining purposes embraces the whole claim thus characterized, though the actual occupancy or work done be only upon, or of a part, and though the party does not enter in accordance with mining rules, or under paper title. The rule which applies to agricultural land, and holds to a more strict interpretation of a *possessio pedis,* does not apply to such a case. Inclosure, if not impossible, besides being probably hurtful to other interests and rights, would be wholly useless. It would give no greater or better advertisement of the extent of the claim than those physical signs, nor give any better protection to the premises against intrusion, or show any higher power of dominion."

Again, in the case of Table Mt. Tunnel Co. v. Stranahan, 20 Cal. 198. (We quote from the syllabus):

"Possession of mining ground, acquired by an entry under a claim for mining purposes, upon a tract the bounds of which are distinctly defined by physical marks, accompanied with actual occupancy of a part of the tract, is sufficient to enable the possessor to maintain ejectment for the entire claim, although such acts of appropriation are not done in accordance with any local mining rule."

Applying these principles of law to the facts in this case, as determined by the courts of the State of California, we are of the opinion that our contention upon this branch of the case should be sustained, and that this court should determine, as a matter of law, that the decision of the supreme court of the state of California is based upon grounds, non-federal in character, sufficient to support its judgment.

In the very late case of Clipper Min. Co. v. Eli Min. & L.

Co., 194 U. S. 220, this identical question was presented and considered. In the course of the decision, this court said:

"It will be seen that Section 2322 gives to the owner of a valid lode location the exclusive right of possession and enjoyment of all the surface included within the lines of the location. That exclusive right of possession excludes any trespass. No one, without his consent, or, at least, his acquiescence, can rightfully enter upon the premises or disturb its surface by sinking shafts or otherwise. It was the judgment of Congress that, in order to secure the fullest working of the mine, and the complete development of the mineral property, the owner thereof should have the undisturbed possession of not less than a specified amount of surface. That exclusive right of possession is as much the property of the locator as the vein or lode by him discovered and located. In Belk v. Meagher, 104 U. S. 279, 283, 26 L. ed. 735, 737, it was said by Chief Justice Wait that 'a mining claim perfected under the law is property in the highest sense of that term;' and in a later case (Gwillim v. Donnellan, 115 U. S. 45, 49, 29 L. ed. 348, 349, 5 Sup. Ct. Rep. 1110, 1112) he adds:

"A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location, there is another location in full force, which entitles the owner to the exclusive possession of the land, the first location operates as bar to the second." * * * *

"The difficulty with the case presented by plaintiff in error is, that under the findings of fact, we must take it that the entries of the locators of these several lode claims upon the placer grounds were trespassers, and as a general rule no

one can initiate a right by means of a trespass. Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 732; Trenouth v. San Francisco, 100 U. S. 251, 25 L. ed. 626; Haws v. *Victoria Copper Min. Co. 160 U. S. 303, 40 L. ed. 436, 16 Sup. Ct. Rep. 282. See also Cosmos Exploration Co. v. Gray Eagle Co. 61 L. R. A. 230, 50 C. C. A. 79, 112 Fed. 4, in which the court said (L. R. A. p. 242, C. C. A. p. 93, Fed. p. 17);

"No right can be initiated on Government land which is in the actual possession of another by forcible, fraudulent, or clandestine entry thereon. Cowell v. Lammers, 10 Sawy. 246, 21 Fed. 200, 202; Nevada Sierra Oil Co. v. Home Oil Co. 98 Fed. 674, 680; Hosmer v. Wallace, 97 U. S. 575, 579, 24 L. ed. 1130, 1132; Trenouth v. San Francisco, 100 U. S. 251, 25 L. ed. 626; Mower v. Fletcher, 116 U. S. 380, 385, 386, 29 L. ed. 593, 595, 6 Sup. Ct. Rep. 409; Haws v. Victoria Copper Min. Co. 160 U. S. 303, 317, 40 L. ed. 436, 440, 16 Sup. Ct. Rep. 282; Nickals v. Winn, 17 Nev. 188, 193, 30 Pac. 435; McBrown v. Morris, 59 Cal. 64, 72; Goodwin v. McCabe, 75 Cal. 584, 588, 17 Pac. 705; Rourke v. McNally, 98 Cal. 291, 35 Pac. 62."

If a placer locator is, as we have shown, entitled to the exclusive possession of the surface, an entry thereon against his will, for the purpose of prospecting by sinking shafts or otherwise, is undoubtedly a trespass, and such trespass cannot be relied upon to sustain a claim of a right to the property in dispute.

Upon the merits, therefore, we confidently assert that the position of the trial court, and the Supreme Court of the State of California, is right, and that the location under which these defendants in error should be upheld and adjudged valid as against any asserted claim of these plaintiffs in error.

V.

The plaintiffs in error are not in position to present for the consideration of the court their contention that the conveyance to E. O. Miller by his associates on July 31, 1897, being given prior to any discovery, vested no title in him, or his lessees, which contention is presented under paragraph VI, page 63 of their brief.

The position of the defendants in error upon this branch of the case is as follows:

1. The plaintiffs in error are to be treated as intruders and trespassers and cannot raise this question.

2. That the decision of the Supreme Court of the State of California is correct under the facts in this case.

It would seem apparent that it does not lie in the mouth of these plaintiffs in error to question the validity of the placer mining location under which the defendants in error claim for the reason that they have in no manner connected themselves with the United States, and upon the present hearing are to be treated as mere trespassers and intruders upon the prior possession of the defendants in error.

The facts upon which this case is to be determined by this court are: that the plaintiffs in error never made any discovery of petroleum or other mineral within the boundaries of their respective claims; that they have never done any assessment work whatever to keep alive their claims; that for the purpose of making their attempted locations, about midnight, or in the morning of January 1st, 1897, they intruded upon the possession of E. O. Miller, one of the defendants in error; that they never have been in possession of the land, but that all of the land in controversy ever since

December 31, 1896, has been in the sole, exclusive and personal possession of the defendants in error. These facts mean, if they mean anything at all, that these plaintiffs in error cannot bring in question the validity of the title under which these defendants in error claim, as the actual possessory title of the defendants in error is sufficient to support the judgment of the courts of the state of California as against the plaintiffs in error. In that behalf, we refer you to the argument already presented and the authorities to which we there referred, in support of the possessory title of these defendants in error.

In the case of Horn v. Jones, 28 Cal., 194 it was said:

"It was held in Head v. Fordyce, 17 Cal. 151, that a party 'has the right to be quieted in his title whenever any claim is made to real estate of which he is in possession, the effect of which claim might be litigation or a loss to him of the property.'"

In the case of McGovern v. Mowry, 91 Cal., 383, it was stated:

"His contention is, that it is incumbent upon the plaintiff in a suit of this character to establish a perfect title of record or by prescription, whether the defendant has any title or not, and that on the failure of such proof by the plaintiff, the action should be dismissed. Counsel for respondents claim, on the contrary, that actual possession under claim of ownership is sufficient evidence of title in the plaintiff as against a trespasser or one who establishes no title in himself.

"Section 1006 of the Civil Code provides that 'occupation for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will or succession.'

" 'The possession of real estate is prima facie evidence of the highest estate in the property, to wit, a seizin in fee.' " (Hill v. Draper, 10 Barb., 458.)

"The plaintiff was in the actual possession and occupation of the premises at and for a long time before the commencement of this action. This was sufficient to enable him to maintain an action to quiet title against any one who, like defendant, never had any title, but who claimed to have title to the premises."

In the very early case of Hicks v. Davis, 4 Cal., 68, this rule is announced in the following language:

"We have always determined that possession is prima facie evidence of title, and this principle is firmly fixed in all common law jurisprudence. That its efficacy has been impaired by modifications and conditions, by some judges in other countries, is clearly manifested by the decisions."

In the case of Winans v. Christy, 4 Cal., 70, it was held:

"We decided in the case of Hutchinson v. Perley, ante, 3, that possession was prima facie evidence of title and that proof of prior possession was sufficient evidence on which to maintain ejectment against a mere naked trespasser. * * * It is not a mere prior possession, but possession coupled with color of title, which must prevail, except where a better title is shown in the defendants. * * * Neither were the plaintiffs, although they had alleged in their declaration a fee simple title, compelled to prove the same. They could properly rely upon prior possession, if they chose to do so."

In Potter v. Knowles, 5 Cal. 87, the following language is used:

"In Adams on Ejectment, the rule in such cases is laid

down thus: 'It has already been observed that possession is prima facie evidence of ownership; and as between two parties who rely upon possession solely, the presumption is in favor of the first possessor; so that proof of possession by a claimant, however short, will entitle him to recover, unless the defendant can account for such possession or show a prior possession or title in himself, or a third person.'"

In Crandall v. Woods, 8 Cal., 136, the following language is used:

"One who locates upon public lands, with a view of appropriating them to his own use, becomes the absolute owner thereof as against every one but the government, and is entitled to all the privileges and incidents which appertain to the soil subject to the single exception of rights antecedently acquired. He may admit that he is not the owner in fee, but his possession will be sufficient to protect him as against trespassers. If he admits, however, that he is not the owner of the soil, and that the fact is established that he acquired his rights subsequent to those of others, then as both rest alike for the foundation upon appropriation, the subsequent locator must take subject to the rights of the former, and the rule,—*qui prior est in tempore, potior est in jure*, must apply."

In the case of Hicks v. Coleman, 25 Cal., at page 141, it is said:

"In the apt and accurate language of Mr. Justice Heydenfeldt, in Norris v. Russell, 5 Cal. 250, 'it is objected that the defendant had color of title, although his possession was subsequent to plaintiff, and therefore it is urged his possession ought to prevail. But it must be held in view that prior

possession is evidence of title, and cannot by any system of reasoning be made to yield to mere color of title, or in other words, to that which is not title."

Also in Keane v. Cannovan, 21 Cal. 305, Mr. Chief Justice Field used language equally applicable. He said:

"The possession of Monodolet was evidence of seizin in fee in him, and no further or higher evidence of title was required to enable the plaintiff claiming through him to recover, until the defendant had shown an anterior possession or had traced title to a paramount source. It is immaterial, in this view, whether we consider the tax deed to Dumartheray sufficient to constitute color of title or otherwise."

In the case of Page v. Fowler, 37 Cal., 100, it was held:

"A party in the actual possession of public land, to which he has no title, is to be deemed the owner as against mere intruders without title or color of title; and the fact that such party has a deed for the land from one who did not own it, does not place him in a worse position, nor does it enable a trespasser to claim that he must rely on his paper title, and not on his prior possession."

In the case of Fletcher v. Mower, 56 Cal., 421, it is said:

"But it is quite obvious that the plaintiffs, by virtue of their prior possession, as found by the Court, were entitled to recover the possession of the premises from a mere naked intruder, which the defendant is found to be. It is unnecessary, therefore, in this action, to determine whether or not the plaintiffs have acquired title from the paramount source, because it is conceded that the defendant has not. The maxim, *qui prior est tempore, potier est jure*, is applicable to this case.

"This doctrine has become so familiar to the bar of this State as to render any elaboration of it wholly unnecessary."

In the case of Brandt v. Wheaton, 52 Cal., 430, it is said:

"As against a mere trespasser, one in possession of a portion of public land will be presumed to be the owner, notwithstanding the circumstances that the Court has judicial notice that he is not the owner, but that the government is. This rule has been maintained from motives of public policy, and to secure the quiet enjoyment of possession which are intrusions upon the United States alone."

In the case of Webb v. Clarke, 74 Cal., p. 11, it was held:

"But it has been held in a long line of decisions that where a party enters under a color of title, and has actual possession of a part of the whole tract, he has constructive possession of the whole tract, described in the document. (Hicks v. Coleman, 25 Cal. 122; 85 Am. Dec., 103; Hoag v. Pierce, 28 Cal., 191; McKee v. Greene, 31 Cal., 420; Ayers v. Bensley, 32 Cal., 631; Russell v. Harris, 38 Cal., 426; 99 Am. Dec. 421; Donahue v. Gallavan, 43 Cal., 573; Spect v. Hager, 65 Cal. 443.) And it makes no difference that the grantor had neither title nor possession (Walsh v. Hill, 38 Cal., 487, 488), provided the document was not void on its face and the party entering under it believed in good faith that he acquired an interest under it. (Walsh v. Hill, 36 Cal. 487, 488; Cannon v. Union Lumber Co., 38 Cal., 674; Wolfskill v. Malajowich, 38 Cal., 281)."

In the case of Zilmer v. Gerichten, 111 Cal., 73, it was said:

"As above stated, the evidence for plaintiff tended to prove prior actual possession of the demanded premises by the

plaintiff. As against the defendants, who were alleged to be wrongfully in possession when the action was commenced—March 1, 1893—the prior possession of plaintiff was prima facie evidence of his title. (Morton v. Folger, 15 Cal., 275; Leonard v. Flynn, 89 Cal., 543; McGovern v. Mowry, 91 Cal., 383)."

It seems to be contended on the part of the plaintiffs in error that the mere possession of E. O. Miller and his associates was not subject to barter and sale, but was at best a mere license. This is not the rule in the State of California. In the case of Johnston v. Rickett, 5 Cal., 218, this language is used:

"There is no pretense on either side that there is title, and indeed the character of the estate—that of a mere naked possession of public lands—is set out in the contract upon which the plaintiff relies and makes part of his bill, and it follows that the only relief he seeks is consonant with the power of the defendant, that of a conveyance of what the defendant actually has, and nothing more—the enjoyment of the possession of the land according to the true intent and meaning of the contract. It has frequently been decided that lands held by no other tenure than possession may be the legitimate subjects of contract."

Upon the particular contention now under discussion Justice Henshaw, speaking for the Supreme Court of the State of California, said:

"It sufficiently appears from what has heretofore been said that a location such as this, made by eight associates, is but a single location, each associate having an individual eighth interest in the whole. It further appears that certain

valuable rights become the property of such locators even before discovery. They have the right of possession against all intruders (Garthe vs. Hart, 73 Cal., 541) and they may defend this possession in the court (Richardson v. McNulty, 24 Cal., 339). They have, then, this right of possession and with it the right to protect their possession against all intrusion, and to work the land for the valuable minerals it is thought to contain.

"We cannot perceive why these rights may not in good faith be made the subject of conveyance by the associates as well before as after discovery. There is certainly nothing in the express law upon the subject to lead to the view that this cannot be done, and there is much to give countenance to the contrary conviction. Thus the law expressly provides that if one of the co-locators abandons his claim or interest by refusing to bear his portion of the cost of the assessment work, such abandonment does not, as would be claimed, work the destruction of the whole location, 'but his interest in the claim shall become the property of his co-owners who have made the required expenditures.' (Rev. Stats., U. S., Sec. 2324).

"It is to be borne in mind that a location such as this though it contained 160 acres, is still a single location, a single claim, with undivided interests covering the whole of it.

"Any work done upon the claim is done for the benefit of all the co-locators. It is undisputed that when the location has once been perfected one of the associates may by conveyance acquire all of the rights of his fellows, and we can perceive no reason why the right to prosecute the work and perfect such a location by discovery may not itself be vested in a single one of them. If, instead of conveying, the seven associates stood idle and refused to contribute their share to

the necessary work of developing, and Miller under these circumstances, had alone prosecuted the work to a successful discovery, no one could contend, in the face of Section 2324 of the Revised Statutes of the United States, but that Miller would have acquired the rights of all, and would have had a perfected location covering the whole 160 acres.

"If then, by their abandonment, without a conveyance, Miller would have acquired the right to prosecute the work and perfect the whole location for himself individually, it is impossible to see why a conveyance to him of their right, instead of an abandonment of it by refusal to join in the work, should effectuate any different result."

As we understand it, the precise question attempted now to be raised by the contention referred to is this: Assuming that Miller and others entered upon the land in controversy upon the date claimed, and that the land at the time was vacant and unappropriated land of the government of the United States, and barring the question of discovery, was in all respects subject to location as a placer mining claim, and that barring said question of discovery it was located by eight persons competent to make such locations, the notices posted and recorded and the boundaries properly marked and that no discovery of mineral or petroleum sufficient in law was made at the time of the location; that subsequent to the location and prior to an actual discovery of mineral the locators, other than the defendant in error, E. O. Miller, conveyed to said Miller, who held the entire title to the property in controversy in his own name for himself, and two or more other persons; the facts chronologically stated being (the dates are stated with only approximate regard for accuracy) that the notice was posted and the location made on the 31st day of December, 1896, and the locators and their successors

in interest have ever since remained in the actual and undisputed possession of the entire property except for the controversy in regard to title involved in this suit; that his co-locators conveyed to Miller about the last days of July, 1897; that Miller leased to the Home Oil Company, a corporation, about the month of September of the same year, and that said Home Oil Company immediately commenced to sink a well, and within that year discovered and developed a very large producing and paying oil well, and has since continued the development of the property and has expended very large sums of money thereon and developed numerous paying and extraordinarily productive wells thereon.

Under this state of facts the contention is made that the attempted location is invalid for any purpose prior to the actual discovery of mineral; that the effect of the conveyance of his co-locators to Miller before the discovery was that of an abandonment by them of their location of the property; that their conveyance to Miller was void except to the extent of its being an abandonment, and that there not being in existence at the time of the discovery eight qualified locators, that the discovery vested no title in Miller or his lessees, and from and after the date of the conveyance to Miller by his co-locators, (at least we assume that this is the contention) that the land was abandoned, unoccupied and subject to location by any other qualified locators and without a discovery the locators who had conveyed to Miller being eliminated from the consideration, vested no title or interest in any one, and that, therefore, the facts and circumstances considered there never has been a concurrence of qualified locators or a location and discovery of a valid placer mining claim, and that therefore the defendants in error have failed to prove title.

The record does not disclose that this question was ever raised by the plaintiffs in error in any of the courts of the State of California, and it further appears from the determined facts in the case that the entry of these plaintiffs in error was surreptitious upon the actual and bona fide possession of the defendants in error.

It is contended on the part of the plaintiffs in error that the location of E. O. Miller and his associates was invalid under any aspect of the case until oil had been actually developed. As we all concede that no discovery was ever made prior to that time, yet, the fact remains that the respective locations of the plaintiffs in error stand upon the same footing as they never, at any time, made any discovery of mineral within the boundaries of their alleged claims. It would seem therefore, that these plaintiffs in error have no such title as permits them to raise any question as to the title of the defendants in error. It would seem to us that these considerations are undisputed and are conclusive to the effect, that, tested by their own statements and arguments, the plaintiffs in error are mere trespassers and not entitled to dispute the title of the defendants in error, who are in the actual possession of the property.

The assumption that the locator of a mineral claim, or an association of eight persons locating a group of eight claims, are trespassers upon, and have no interest in, such mineral claim until the actual discovery of mineral, is far from sustained by the authorities. In fact, the contrary is amply sustained by all of the authorities upon this subject.

The exact nature and extent of such right or interest is, we assume, the only question open to serious discussion. We do not consider that the question of what does or does not constitute a sufficient discovery with relation to an oil claim

located under the placer mining laws, is here involved. We shall therefore not discuss the same. It is undoubtedly true, however, that the decisions in the department have clearly tended to establish its position to the effect that the existing and surrounding conditions where proven may be taken into consideration and that such being considered the conditions may amount to a discovery sufficient to justify the miner in the location of his claim and its further development in the absence of such actual and extensive discoveries within the boundaries of the claim as would be required in the location of a quartz claim and perhaps in the location of a gold placer.

We claim that one who enters upon a tract of the public lands of the United States, and puts up a notice claiming a given described tract, and then marks the boundaries of that tract so that they can be readily traced, and in the notice claims the tract under the mining laws, takes possession of it, and proceeds with work in developing it, though he may have made no discovery, has rights therein, and among those rights is the right to the possession of the tract as against all intruders.

It seems to be suggested that the parties posting and recording notice of location and marking the boundaries could not prevent the re-location by some one else; but turning to the Revised Statutes of the United States dealing with this question of acquiring titles to mineral lands, it will be seen that it is provided that "the locators of all mining locations heretofore made, or which shall hereafter be made on any mineral vein, lode or ledge situated on the public domain, their heirs and assigns * * * so long as they comply with the laws of the United States and with the state, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive

right to possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes, etc."

Revised Statutes, Sec. 2322.

We have now two other provisions of the Statute necessary to be noticed at this place. One is that no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.

Ib. Sec. 2320.

The other, the location must be distinctly marked on the ground so that its boundaries can be readily seen.

Ib. Sec. 2324.

It is held everywhere that so far as the laws of the United States are concerned, nothing is required to make a complete and perfect location of a mining claim, except these two things; discovery and marking the boundaries on the ground so that they can be readily traced; but when those two things are done, the locator or locators have acquired the exclusive right of possession and enjoyment of all the surface included within the lines, and of all mines therein. This is not a right which exists against intruders alone; it is perfect and complete against the United States government, and so long as the locator performs the conditions upon which, under the laws of the United States, his title is to continue, it is good against the United States itself.

In Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735, the court said:

"It follows that on the 19th day of December, 1876, the owner of the original location had, under the Acts of Congress, the exclusive right to the possession and enjoyment of the property in dispute. A mining claim *perfected under the law* is property in the highest sense of the term, which may

be bought, sold and conveyed, and which may be passed by descent. * * * * There is nothing in the act of Congress which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location, than it is for any other grant of the United States."

See also Forbes v. Consolidated Virginia Mining Company, 94 U. S. 762, 26 L. ed. 313.

In Noyes v. Mantle et al. 127 U. S. 348, 32 L. ed. 168, a patent had been issued for a placer claim within the boundaries of which was a lode claim upon which a location had been made, including the discovery, and after stating the case, the court said:

"They had thus done all that was necessary under the law for the acquisition and enjoyment of the ground. The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect, and that they could obtain at any time upon proof of what they had done in locating the claim, and of subsequent expenditures to a specified amount in developing it. Until the patent issued the government held the title in trust for the locators or their vendees. The ground itself was not afterwards open to sale. The location having been completed in April, 1878, antedates by some months the application of the defendant for a patent for his placer claim."

Then after setting out section 2322 of the Revised Statutes and referring to other cases which had been decided by the Supreme Court, construing that section, they said:

"That section can have no application to the lodes or veins within the boundaries of a placer claim which have been previously located under the laws of the United States; and

are in possession of the locators or their assigns; for, as already said, such locations when perfected under the law are the property of the locators, or parties to whom the locators have conveyed their interest."

And after quoting from Belk v. Meagher, it is further said:

"It is therefore not further subject to the disposal of the government."

Now it is admitted on all hands that neither discovery, nor marking the boundaries alone, will vest this absolute right to exclusive possession which makes the surface and the mines beneath, the property of the locator, and withdraws them from disposition by the United States. It takes both of these things to accomplish this result; but it is submitted that it does not follow that one who has posted the notice and marked the boundaries and taken possession and entered upon the exploration and development of the mines supposed to be contained therein, has no rights which a mere intruder is bound to respect. The contrary has been repeatedly decided, and indeed it is but the application to public mineral lands of principles which had long before been determined with respect to agricultural lands.

In Atherton v. Fowler, 97 U. S. 513, 24 L. ed. 732, the court said:

"Unless some reason is shown, not found in this record, these were the persons entitled to make pre-emption, and no one else." (Referring here to persons claiming under Vallejo, who had settled upon the lands and improved them and erected dwellings thereon, and then the court continued): "But suppose they were not. Does the policy of the pre-emption law authorize a stranger to thrust these men out

of their houses, seize their improvements, and settle exactly where they settled, and by these acts acquire the initiatory right of pre-emption? The generosity by which Congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling house did not mean to seize some other man's dwelling. It had reference to vacant land; it would have shocked the moral sense of the men who passed these laws, if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicides and other crimes of less moral turpitude."

The same doctrine has been declared in numerous other cases.

Hosmer v. Wallace, 97 U. S. 375 24 L. ed. 1130, 1132.
Quinby v. Conlan, 104 U. S. 220, 26 L. ed. 801.
Hosmer v. Duggan, 51 Cal. 170.
Brown v. Morris, 59 Cal. 64, 73.
Hambleton v. Duhain, 71 Cal. 136, 140.

The principle of these cases has been directly applied to the location of mineral lands.

Crossman v. Pendery, 8 Fed. 693.
Field et al. v. Gray et al., 26 Pac. 793.
Weise v. Barker, 2 Pac. 919.

We quote from that case the following passage:

"The record in that case shows actual possession of the

appellees, which is *prima facie* evidence of title; and as we said in Lebanon Company against Consolidated R. E. P. M. Co. 5 Colorado, 380, entering upon the premises in the *actual possession of another* for the purpose of performing the acts necessary to constitute location and possession, amount only to a trespass, and cannot form the base for the acquisition of title. Whether the location of Barker and his co-tenants be valid or not, their possession is sufficient to defeat an action to recover by the appellants."

As we have said already, marking the boundaries and making discovery are equally essential to this perfect or completed location, which gives in some sense, and in a very proper sense, a title. Now, if one has no rights at all under the Acts of Congress, until both things are done, it would appear that no state legislation could give him any; and yet many of the States of the Union have enacted laws in which they have provided in varying terms, that when one has made a discovery, he is protected in his possession against the whole world for some limited time, generally sixty days, sometimes ninety days, and sometimes even longer, in which to perfect and complete his location. A number of these acts will be found in the end of Vol. 2 of Lindley on Mines, commencing at page 1235.

The first act is that of Arizona, which, after providing for the notice of location, pages 1235 and 1236, and providing that before the location certificate is filed with the County Recorder, the discoverer shall locate his claim by first sinking a discovery shaft upon the premises, etc.; secondly, post at the point of discovery the notice substantially conforming to the location certificate; third, by marking the boundaries; provides in section 6 that the discoverer shall have ninety

days from the date of discovering the lode, and the posting of the notice thereon, to perform said discovery work thereon.

Ib. page 1237.

California had a statute upon this subject, enacted in 1897.

Statutes of 1897, page 215.

This required the discoverer to immediately erect at the point of discovery a substantial monument or mound of rocks, and post thereon a preliminary notice, stating what it contained. (Ib. 1243, 1244). Within sixty days from the date of discovery he was required to do certain work, and to file his notice in the County Recorder's office.

Ib. 1245, 1246.

Colorado had a similar law, 2 Lindley 1263, requiring the discoverer, within three months from the date of the discovery, to record his claim, and before filing such location certificate he was required to sink a discovery shaft; and by the 8th section he had sixty days from the time of uncovering, or disclosing a lode to sink a discovery shaft thereon.

Ib. 1263, 1265.

Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, all have laws quite similar, and all of which are contained in the work referred to. These laws have been uniformly upheld by the state courts and we know of no case in which their validity has been denied by a federal court.

The Colorado Act seems to be distinctly upheld by Judge Miller in Erhardt v. Boaro, 8 Fed. 692. In the course of his opinion in this case he said:

"The law of the State gives sixty days after making discovery of mineral in which to sink a shaft ten feet in depth. The main object of the sixty days' possession, it seems to the

court, must be to allow time to discover the course of the lode, in order that the location may be made thereon. Counsel for defendants made an ingenious argument to show that the locator during those sixty days to hold his right must remain in continuous, actual possession of the ground. The court does not so hold. If the discoverer put up a stake at the point of discovery, giving the name of the lode, date of discovery, and notice of his intention to locate the claim, this is equivalent to actual possession. Otherwise, the statute serves no useful purpose. The intention of the statute must be that the setting up of the discovery stake, with the notice thereon, as required, is equivalent to *actual possession* for the sixty days within which he may proceed to the next step, to-wit, sink the discovery shaft to the depth of ten feet, have survey made, mark the lines, and make formal location."

But we submit again that if the acts of Congress do necessarily negative the existence of any right at all in the locator, until his right is absolutely perfect, then these statutes could not confer any such right; but it has been universally admitted that they are valid and do protect the party during the time named, in the prosecution of the work to a completed and perfected location.

In Omar, et al. v. Soper, et al. 18 Pac. 443, the Supreme Court of Colorado had under consideration the Colorado statute, and in the course of the opinion the Chief Justice said:

"It is conceded that if the boundaries of the Golden Bell had been marked, no claim to any portion thereof could have been initiated until a forfeiture had occurred. To hold that the miner, as soon as he discovers a lode, must immediately stake the territory which he is entitled to claim in order to

protect himself from the invasions and claims of any person learning of his find, would be an unreasonable, if not an impossible, requirement. An attempt to do so would result in many cases in leaving the main portion of the lode outside of the staked boundaries. The object of the statute in giving sixty days for sinking the discovery shaft was evidently to afford the miner time to sink his shaft and to ascertain the true course of his lode, when he would be qualified *to mark its boundaries on the surface.* * * * To hold that the claim is protected throughout its whole extent during this period, from invasion and adverse claims, by a notice which, in addition to the statutory requirements, shall specify the extent of the territory claimed along the vein on both sides of the point of discovery, is both reasonable and equitable. It is likewise consistent with the spirit and policy of the statute, and a construction which renders it effective. Such a notice properly made and posted is an appropriation of the territory specified therein for the period of sixty days. It has been repeatedly held that only the unappropriated mineral lands of the United States are open to exploration and location. No one can, therefore, lawfully enter upon the territory so claimed during the period named, for the purpose of initiating a claim thereto; and it necessarily and logically follows from an application of the same rule and principles, that no one during this period can stand outside such appropriated territory, and in any manner initiate a claim thereto capable of being rendered valid in the future by the happening of fortuitous circumstances."

In Richardson v. McNulty, 24 Cal. 339, 344, in speaking of the transfer made in that case, the court said:

"If the gift be complete * * * a transfer is the result,

which transfer as much precludes the idea of abandonment as a transfer resulting from a sale. No question of abandonment can arise where a transfer has been had by the act of two parties. To an abandonment of the character involved in this and all similar cases, there can be but one party. The mining ground in controversy, before it was occupied by the plaintiff, so far as the right to mine the same by parties without title is concerned, (and this is true of all the public mineral land of the State) was *publici juris* and open to the appropriation of any one desiring it. By the act of occupancy, the plaintiff made it his, and manifested his intention to do so. Once his, it continues his until he manifests his intention to part with it in some manner known to the law. He may sell it * * * or he may abandon it. In doing the latter he must leave it free to the occupation of the next comer, whoever he may be, without any intention to repossess or reclaim it for himself in any event. * * * When this is done, a vacancy in the possession is created, and the land reverts to its former condition, and becomes once more *publici juris*, and then, and not until then, an abandonment has taken place. There can be no abandonment except where the right abates, and ceases to exist. If it be continued in another, by any of the modes known to the law for the transfer of property, there has been no abandonment, for the right, first acquired by the occupancy, still exists, although vested in another, and the continuity of possession remains unbroken."

In the case just quoted from, referring to an instruction of the court that the plaintiffs in error being in actual possession, though without right, yet the defendants in error could not from that circumstance alone recover, because of the rule of the law that he must recover upon the strength of his own title, the court said:

"It is insisted that the present case differs from that of McGarrity v. Byington, because, as is claimed, it involves an outstanding title. There may be an attempt to raise a question of that kind, but under numerous decisions of the late Supreme Court, no such question can be made in an action of ejectment in which the plaintiff, as in the present case, relies absolutely upon prior possession, and the defendant fails to connect himself in any manner with the outstanding title. * * * In this case only a question of possession is involved. The naked prior possession of the plaintiff is pitted against the naked present possession of the defendants. Strict title is not involved. The doctrine that the plaintiff must recover upon the strength of his own title is applied to cases where the strict legal title in contradistinction to a mere possession is involved. In such a case the defendant may defeat the legal title relied upon by the plaintiff by showing the true legal title to be in a third person, but where mere prior possession is relied on and the defendant is a mere intruder, he cannot justify his act by showing the true title to be outstanding."

Here is a distinct recognition of the right to maintain an action in ejectment to recover a mining claim upon possession merely, and we think that this doctrine has the sanction of the Congress of the United States.

Revised Statutes, Sec. 910.

These cases, too, have, as we think, been approved and confirmed by the recent decision of the United States Circuit Court of Appeals, on the Cosmos Exploration Co. v. Gray Eagle Oil Co., and Pacific Land Improvement Co. v. Elwood Oil Co., 112 Fed. Rep. 4, 14-18. We submit, therefore, that the defendants' in error right to recover in this action is

established, wholly independent of any other question, other than that of the prior and actual possession.

In Stark v. Barnes, 4 Cal., 412, where the defendant sought to defend his right under the act prescribing the mode of maintaining and defending possessory actions on lands belonging to the United States, and where it appeared that one Morrison had taken up a claim adjoining the land, and which he supposed included this part, but when he had marked off his claim, found the portion in dispute was left out; and it remained unoccupied until Stark entered upon it in October, 1850,—the Court said, that notwithstanding the fact that several persons were in the habit of cutting fire wood from it, the land was, within the meaning of the statute, unoccupied at the time of Stark's entry. He had erected a house upon the land, which was soon afterwards torn down, but immediately afterwards rebuilt, and he continued to occupy it until the time of the trial, and proceeded step by step to perfect his claim, which, in the month of February following, he marked out, so that the boundaries might be readily traced and its extent easily known; but before completing the series of acts necessary to perfect his claim, he was disturbed in his possession by Morrison, who entered upon the land, commenced building a house, and having completed it, conveyed it to Barnes, the appellant, who as his successor resided upon it and continued to do so until the trial of the case. They further said that this action of Morrison, though commenced in the afternoon of the same day that Stark entered upon the land, was trespass upon the possessory rights of Stark, and could in no way bestow any right of possession upon the trespasser; that Barnes, taking under him, was but his successor in the trespass, and became himself a trespasser. It was contended by the appellant that Stark had no possession

within the meaning of the statute, and this was based upon the ground that he had not perfected his claim by the performance of such acts as are required by law; but the court said:

"We consider that this is a case to which the doctrine of relation applies. The doctrine is correctly stated by the court below, and where a number of acts are to be performed in virtue of which a right accrues, the time of performance of the last act, when all have been performed in good faith, relates back to the commencement of the series of acts which create the right, so as to make it perfect when the first act was being commenced."

"* * * * * * The object of the act being to encourage the settlement and cultivation of unoccupied lands and securing the actual settler in good faith in his possession and improvements, would be frustrated if while one party was engaged in the performance of the first of a series of acts necessary to be done to entitle him to the benefit of the statute, and before the completion of those acts requiring time and labor, a second party could by force thrust him aside, occupy his claim, and be secure in the possession thereof, on the ground that the claimant first entering upon the land had not completed all the acts that the statute requires before the entry of his disturber; such a construction, instead of accomplishing the great design and purpose of the law, would be to permit wrong, violence and public mischief, and ought nowhere to receive encouragement. It cannot receive the sanction of this court."

In Garthe v. Hart, 73 Cal. 541, which was a controversy in regard to a mining claim, the court, after saying that the plaintiff gave evidence of an attempted location in 1897, and acts tending to show possession, and after the court had

struck out all the evidence of this location, for the reason that it appeared that the same had not been made in compliance with law, and after saying that this order must have been directed to the location merely and not to the possession, because the fact that the location had not been made according to law, was not sufficient to exclude evidence of the possession,—then said;

"Without saying whether the acts done were sufficient to constitute a possession, we think the court erred in its charge to the jury with reference to it. The charge was as follows: 'In order to make a valid location of mining claims, the locator may adopt one of two courses. He may determine to locate his claim in accordance with law and customs. In order to get a title, a possessory title, in this way he must conform to the requirements of law. As I said, there is still another way by which a miner in this state may acquire a right to the possession of a piece of mining ground. It is *by taking possession of it and clearly defining the boundaries so that they may be readily traced, and holding such possession, keeping such possession.*'"

This ends the quotation from the charge to the jury, and the italics are those of the opinion of the court; and the court added:

"In the hurry of the trial, the learned judge evidently overlooked the distinction between the right of a party in possession as against mere intruders, and his right as against one who has complied with the mining laws. Possession is good against intruders * * * * but it is not good as against one who has complied with the mining laws. * * * "

If there be any question of the right to maintain the action upon possession alone, it is submitted that under the

facts in this case that there was a valid mining location complete, perfect, vesting in the defendants in error that right to the exclusive possession required by the statute. The findings show that a proper notice was posted and recorded, boundaries marked and discovery made. But leaving out of sight now, the question of the discovery made by the plaintiffs in error and the intervenor, it is, as we understand it, claimed that in some way or other the transfer of seven of these locators to Miller before discovery, operated to defeat the right of Miller to perfect location by discovery.

In Doe v. Waterloo Mining Company, 70 Fed. 455, it was claimed by the appellants that the Newbill right was abandoned, because he allowed Parker, Wallace and Farrell to become joint locators with him. But the court said:

"There was no intention on his part to abandon his rights. Certainly the contrary appears in his contract with these parties. Abandonment rests, as a rule, in intention. Newbill at the time he made his contract with Parker, Wallace and Farrell had *only the right to make a location of a claim on account of his discovery of a mineral bearing vein containing gold.* There was no rule of law that prevented his making a verbal transfer of his right. Until the statute of California provided otherwise, a mining claim could be transferred by parol or verbal conveyance, accompanied by a change of possession of the premises * * * * *The mere right then to locate a mining claim*, could certainly be so conveyed in the absence of any statutory law. When such a transfer was made there was no objection to the parties making the purchase joining in the location."

There is then, nothing in the mere nature of the transaction of a sale of an interest, or part of an interest, in a right to

locate, or in the location itself, that is contrary to any provisions of the statute.

In Neuebaumer v. Woodman, 89 Cal. 310, 314, 315, the court said:

"The evidence shows that the defendant did not take the necessary steps to locate the mine, nor did the plaintiffs nor their grantors under section 2324 of the Revised Statutes of the United States. The point to be considered, then, is, whether the plaintiffs, or their grantors, were in the actual possession of the claim, and had not abandoned it at the time of the ouster."

The court here then considers what is shown by the evidence, and adds:

"Tucker certainly had possession, after his purchase through William Jones, of a part of the claim, and made a deed of the whole of it to William T. Jones, through whom the plaintiffs claim as their immediate grantor. Tucker had possession of a part, claiming the whole described by metes and bounds, through his deed from William Jones. Thus claiming the whole, he made a conveyance of it by metes and bounds to William T. Jones, and the last immediately entered into possession claiming the whole. This possession was continued in the respondents. This would give them the constructive possession of the whole tract, as against a mere intruder, as the court finds the defendant to be."

We say then that the right whatever it may be, of one who has only begun the location of a mining claim, to transfer his right to locate it, is not in itself objectionable; and that he can transmit to that successor whatever rights he himself has.

But, as we understand it, what is here objected is that if eight locate, by marking the boundaries, and before discovery seven convey to the eighth, there is some rule of public policy, or something in the United States statutes, to indicate that a discovery made by this eighth to whom the conveyance is made, would not give any valid claim to the mine, because it would in effect amount to a location by one person of the 160 acres, which is deemed by them in some way or other contrary to the public policy. But we apprehend that one who asserts an act to be contrary to public policy, must discover the existence of that policy in the statutes or the decisions of the courts passing upon statutes. And where is that public policy to be found in the Acts of Congress concerning the disposition of mineral lands? The injustice of the rule contended for is sufficiently obvious. Suppose eight persons locate by posting a notice and marking the boundaries of 160 acres of land, according to the government survey, thereby making it practically one claim, one location, and requiring but one discovery. They immediately enter upon the possession, and proceed at great cost and expense to explore this land for oil. To bore a well and to develop the petroleum products therein will cost anywhere from $2500.00 to $10,000.00, and some times even more than that. Now, after boring a depth of a thousand or fifteen hundred feet, at an expense of seven or eight thousand dollars, one of these parties became tired and says: "I intend to quit," and he does either abandon his interest by going away without the intention to return, or by conveying to the seven others and walking out. Can he by this means defeat the right of all the remainder, and if one cannot do so, could seven of them accomplish that result? If an intruder upon this possession, who should make a location and discovery, consisting of peer-

ing into this very well bored at the expense of the first locator, could acquire a better right, it would mean practically that the whole claim of one hundred and sixty acres could be bought out by buying out one undivided eighth interest only. But if one person cannot defeat the rights of his co-locators, neither can seven defeat the right of the eighth. And now what reason is there to believe that the Congress of the United States intended by this limitation in regard to the location of claims, to work out any such result? It certainly is not so expressly declared in the statute. The contrary seems to be plainly implied.

Section 2330, Revised Statutes, treating of placer mines, says:

"Legal subdivisions of forty acres may be subdivided into ten acre tracts and two or more persons or associations of persons having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof, and no location of a placer claim made after the 9th day of July, 1870, shall exceed one hundred and sixty acres, *for any one person or association of persons*, which location shall conform to the United States surveys.

Section 2321. "Where placer claims are upon surveyed lands and conform to the legal subdivision, no further survey or plat shall be required * * * * * and no such location shall include *more than twenty acres for each individual claimant.*"

Taking the two provisions together, the meaning would seem to be not to limit the right of the individual to a particular twenty acre tract, but that the entire location should not include more than twenty acres for each individual claimant. So that in the location of this one hundred and sixty acres

by the joint act of the eight persons, there was no violation of the statute. And if the action of a single individual of the eight can affect the claims of the others at all, it must be by putting an end to all right, since there is no particular tract which he forfeits or grants away, but an eighth interest in the whole.

Now that this is not contemplated by the acts of Congress, and the fact that the remainder go on and perfect their title and obtain patent, is not a thing condemned by Congress, is shown by the act itself; for that act provides:

"That upon the failure of any one of the several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements, may at the expiration of the year, give such delinquent co-owner personal notice in writing, or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication, such delinquent should fail or refuse to contribute his proportion of the expenditure * * * * his interest in the claim shall become the property of his co-owners who have made the required expenditures."

Revised Statutes, Section 2324.

It is manifest that this provision is not limited to *one* who fails, but if one after another, or seven in the first instance, fail to put in their proportion of the expenses, after the notice given by the one, and the lapse of time thereby prescribed, he becomes the owner of their interests, and being the owner can proceed to obtain the patent for the entire one hundred and sixty acres. It is true that it may be said that he must first make a discovery; but that has nothing to do with the present question of the policy of this statute to limit

one person to twenty acres. It does nothing of the kind. It so limits the location in the first instance, but when the location is made and there is no evidence of fraud, no bad faith is to be imputed to any of them, the statute does not set its face against one only of them acquiring the title ultimately from the United States, by means of a patent; and if one only can proceed to the extent of obtaining a patent, why can he not proceed to the extent of perfecting the location and thereby becoming entitled to the exclusive possession.

If when the location is once perfected, one party may acquire the entire interest of his associates, and obtain a patent from the United States for that entire interest, why is it not equally true that this right to locate, vested in the eight persons, may be succeeded by one, two, or half a dozen of them, and the location perfected by them? If there is any reason, it is not to be found in public policy, because no such public policy can be found in the statute; but, on the contrary, the statute itself provides for a case in which one only, or any number less than all, may acquire the whole.

The plaintiffs in error, as we have said several times, have no discovery. No one has acquired title from the government, and no one is entitled to acquire it unless the defendants in error are. And we submit that under such circumstances, the action of the defendants in error and their predecessors is not so completely a nullity as that no rights of any kind either did, or could, vest.

The claim that the deed of these associates of Miller operated as an abandonment of the mine, is distinctly refuted by the case in the 24th California Reports already cited. Abandonment is the act of one person. It is the vacation of possession, occupancy, without any intention to return to it. It cannot take effect by operation of a transfer in writing made

by one person to another. Besides that, nothing is gained by calling it abandonment. If these persons had nothing to convey, they had nothing to abandon. Abandonment does not take place until there is some right to abandon.

If of the eight locators, seven had simply done nothing, and the eighth proceeded as he did to develop the mine, and had made the discovery which he did, there would be no question, could be none, made by any person to his right. Does he lose all right to perfect the claim because he does the same thing after a conveyance is made to him? We have here these decisions that one in actual possession, before discovery, can maintain that possession against all persons except the United States. If he can keep off all intruders and can by the processes of the judicial tribunals of the country, restrain any person from interfering with him, what is the objection to his making a discovery and completing the acts by which the right to this exclusive possession is vested in him?

There was such a relation between them before the transfer, as that the discovery by one would have enured to the benefit of all; and it is submitted that the transfer of the rights of one or more of them and his associates, does not prevent that act from having the same effect. The only difference between one, who has marked his boundaries, gone into possession, and is availing himself of the license of the United States government to occupy that particular tract for the purpose of exploring it for mineral, but who has not yet discovered the mine,—and one who has done these things and superadded the discovery, is, that, in the latter case, the right has become good against the world, including the government of the United States, and the title has vested. It does not depend upon the actual possession of the property; while

in the other case, the title acquired by possession depends upon the continuance of that possession. This being so, suppose it were true that some policy of the government forbade one from acquiring the interest of all, and then obtaining the patent from the United States; who can avail themselves of this principle? Can a mere intruder? An alien is not by the law permitted to make a location or to enter upon the public lands for the purpose of locating mines or working the same; but it has been repeatedly decided that where an alien has done so, nobody can take advantage of the statute except the government of the United States. His associates cannot oust him; another cannot enter upon his possession and make a location, and deprive him of his rights.

Manuel v. Wulff, 152 U. S. 505, 38 L. ed. 532.

Billings v. Aspen Milling & Smelting Co., 51 Fed. 338, 52 Fed. 250.

O'Reilly v. Campbell, 116 U. S. 418.

Tornanses v. Melsing, 109 Fed. 710-712.

(c) That this court has no jurisdiction to hear or determine this controversy for the reason that no Federal question was ever specially set up or claimed by these plaintiffs in error in the courts of the State of California, and that the decision of the Supreme Court of the State of California was based upon a ground which did not involve a Federal question, and which was broad enough to support the judgment.

Our views upon this proposition are fully set forth in our printed motion on file herein to dismiss, or affirm, this writ of error, and the printed brief in support thereof, to which we most respectfully refer this court for a consideration of all the phases of this question.

We believe we have established, from the record in this case, and the authorities, that, both upon the merits and upon the law, the writ of error should be dismissed or affirmed, and that the decision of the Supreme Court of the State of California in this litigation was right, both upon the law and the facts, and that, as against these plaintiffs in error, the defendants in error, whom we represent, are entitled to a decision of this court, making final and conclusive the decision of the Supreme Court of the State of California.

Respectfully submitted,

L. L. CORY,

Attorney and Counsel for Defendants in Error.

Supreme Court of the United States.

No. 171.—October Term, 1904.

A. Y. Chrisman and H. T. Chrisman, Plaintiffs in Error, *vs.* E. O. Miller and The Home Oil Company. } In error to the Supreme Court of the State of California.

[April 3, 1905.]

This was an action in the Superior Court of Fresno County, California, to quiet title to certain lands in that county. The complaint by Miller and The Home Oil Company was filed October 14, 1898. The case was tried by the court without a jury, findings of fact were made, and a decree entered in favor of the plaintiffs. On appeal to the Supreme Court of the State this decree was affirmed (September 13, 1903). 140 Cal. 440. Thereafter the case was brought to this court on writ of error. The dispute between the parties was as to the validity of respective locations of the land under the mineral laws of the United States. The mineral found therein, and on account of which the locations were made, was petroleum. From the findings it appears that on June 14, 1895, eight persons, one Barieau being of the number, attempted to make a mineral location upon the tract in controversy, the same being an entire quarter section. Whatever interest they thus acquired was on December 24, 1896, conveyed to E. O. Miller. On December 31, 1896, Miller by his written declaration abandoned and relinquished all rights which he had acquired by this conveyance. On the same day and about four hours thereafter Miller and seven others, duly qualified to make entries, made a mineral location of the entire tract. Subsequently all interests obtained thereby were vested in the plaintiffs. On January 1, 1897, the defendants attempted to make a location of certain portions of the tract. The tenth, eleventh, fifteenth, seventeenth and eighteenth findings are as follows:

"X. That immediately after going into possession of said northeast quarter of said section 20, the said plaintiff, Home Oil Company, commenced digging, boring and excavating thereon for petroleum and other fluid products, and has expended in such work the sum of more than thirty thousand dollars, and by means of such digging, boring and excavating discovered large quantities of petroleum therein, and there now exists, and did at the commencement of this action, wells of great depth, sunk and excavated upon said property by said Home Oil Company, from which there is a daily flow of large quantities of petroleum of great value.

"XI. That ever since the 17th day of September, 1897, the said plaintiff, Home Oil Company, has been and is now in the sole and exclusive

possession of all of said real property and engaged in working, developing and mining the same and extracting petroleum and other fluid products therefrom.

"XV. That said defendant A. Y. Chrisman never at any time discovered a seepage of petroleum or other mineral oil upon said land or any part thereof, and the defendant H. T. Chrisman never discovered a seepage of petroleum or other mineral oil upon said land or upon any part thereof, and that the only discovery of petroleum or any other fluid produce upon said lands or upon any part thereof is the discovery made by the plaintiff Home Oil Company as in these findings before stated.

"XVII. That on the said 1st day of January, 1897, no part of the said northeast quarter of section 20 was vacant, public mineral land or open to exploration or location for mining purposes, but on the contrary the whole of said northeast quarter of said section 20 was then in the possession of J. A. Hannah, E. O. Miller, W. F. Hall, D. G. Overall, L. E. Hall, Harry Levinson, R. B. Biddle and Charles H. Smith, under and by virtue of their location of said land hereinbefore mentioned.

"XVIII. That the said defendants A. Y. Chrisman and H. T. Chrisman did not make the location for mining purposes hereinbefore mentioned in good faith, and did not nor did either of them enter into the possession thereof or any part of the same for the purpose of working and mining thereon on the 1st day of January, 1897, or upon any other date; and said defendants have not and neither of them has since the first day of January, 1897, or since any day whatever, done and performed upon said land or any part thereof such work and labor or made improvements thereon as is required by the laws of the United States or of the State of California; and that the said defendants have not been and neither of them has been in the exclusive possession of said tracts of land so claimed by them; and said defendants are not, and neither of them is in the possession of said tracts of land so claimed by them or either of them, or any part thereof; and the said defendants ever since the said 1st day of January, 1897, or since any day whatever or at all have not been nor are they or either of them now entitled to the exclusive or any possession of the tracts of land claimed by them or any part thereof, nor are said defendants entitled, nor is either of them entitled, to the exclusive or any possession whatever of any part of said northeast quarter of said section 20, in township 19 south, range 15 east, Mt. Diablo base and meridian."

Mr. Justice BREWER delivered the opinion of the Court.

In cases coming from a State court we do not review questions of fact, but accept the conclusions of the State tribunals as final. *Clipper Mining Co.* v. *Eli Mining & Land Co.*, 194 U. S. 220, and cases cited in the opinion; *Kaufman* v. *Tredway*, 195 U. S. 271; *Smiley* v. *Kansas*, 196 U. S. 447.

By the findings of the trial court the Chrismans, plaintiffs in error, never made any discovery of petroleum or other mineral oil, did not make the attempted location in good faith, and never did any work on the tract. These findings were of date June 24, 1899, nearly two years and a half

after their attempted location. It would seem from these facts that they had no pretence of right to the premises.

It is contended, however, that the Supreme Court, in its opinion, practically set aside these findings in one respect, and that is the discovery of petroleum. We do not so understand that opinion. The only reference made to the matter is in these words: "The alleged discovery of defendants under their location may be disposed of in a single sentence. It amounted to no more than the pretended discovery by Barieau;" and in reference to Barieau's alleged discovery the court said:

"Upon the question of discovery the sole evidence is that of Barieau himself. Giving fullest weight to that testimony, it amounts to no more than this, that Barieau had walked over the land at the time he posted his notice and had discovered 'indications' of petroleum. Specifically, he says that he saw a spring and 'the oil comes out and floats over the water in the summer time, when it is hot. In June, 1895, there was a little water with oil and a little oil with water coming out. It was dripping over a rock about two feet high. There was no pool; it was just dripping a little water and oil, not much water.' This is all the 'discovery' which it is even pretended was made under the Barieau location."

There is nothing in this language from which it can be inferred that the Supreme Court of the State set aside the finding of the trial court. All that it said was in answer to the contention of the defendants that they had made a discovery, and that contention the Supreme Court repudiated, leaving the finding of fact to stand as it was made by the trial court.

It is further contended that the location made by Barieau and his associates, and conveyed by them to Miller, did not lapse until midnight of December 31, 1896; that then it lapsed by reason of the failure to do the annual work required by statute; that Miller could not prior thereto abandon and relinquish that location, and at the same time make a new one, as he attempted to do on the afternoon of December 31, because the effect of such action would be to continue a possessory right to the tracts without compliance with the statutory requirement of work. Hence, as contended, the only valid location was that made on January 1, 1897, by the defendants. It may be doubted whether, in view of their want of good faith, the defendants can avail themselves of this contention, and, indeed, also doubted whether they could uphold their location by proof of a discovery by some other party. But it has no foundation in fact, for, as found by the trial and held by the Supreme Court of the State, the attempted location by Barieau and his associates in June, 1895, was a failure by reason of a lack of discovery. We have already quoted the declaration of the Supreme Court. The testimony referred to in that quotation, even if true, does not overthrow the finding. It does not establish a discovery. It only suggests a possibility of mineral of sufficient amount and value to justify further exploration.

By chap. 216, 29 Stat. p. 526, "lands containing petroleum or other mineral oils, and chiefly valuable therefor," may be entered and patented "under the provisions of the laws relating to placer mineral claims." By section 2329, R. S., placer claims are "subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims." By sec. 2320, R. S., "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

What is necessary to constitute a discovery of mineral is not prescribed by statute, but there have been frequent judicial declarations in respect thereto. In *United States* v. *Iron Silver Mining Company*, 128 U. S. 673, a suit brought by the United States to set aside placer patents on the charge that the patented tracts were not placer mining ground but land containing mineral veins or lodes of great value, as was well known to the patentee on his application for the patents, we said (p. 683:)

"It appears very clearly from the evidence that no lodes or veins were discovered by the excavations of Sawyer in his prospecting work, and that his lode locations were made upon an erroneous opinion, and not upon knowledge, that lodes bearing metal were disclosed by them. It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as 'known' veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify the exploitation. Although pits and shafts had been sunk in various places, and what are termed in mining, cross-cuts had been run, only loose gold and small nuggets had been found, mingled with earth, sand and gravel. Lodes and veins in quartz or other rock in place bearing gold or silver or other metal were not disclosed when the application for the patents were made."

This definition was accepted as correct in *Iron Silver Company* v. *Mike & Starr Company*, 143 U. S. 394, though in that case there was a vigorous dissent upon questions of fact, in which Mr. Justice Field, speaking for the minority, said (p. 412): "The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral." And again (p. 424): "It is not every vein or lode which may show traces of gold or silver that is exempted from sale or patent of the ground embracing it, but those only which possess these metals in such quantities as to enhance the value of the land and invite the expenditure of time and money for their development. No purpose or policy would be subserved by excepting from sale and patent veins and lodes yielding no remunerative return for labor expended upon them."

By the Land Department this rule has been laid down, *Castle* v. *Womble*, 19 L. D. 455, 457:

"Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby 'all valuable mineral deposits in lands belonging to the United States . . . are . . . declared to be free and open to exploration and purchase.'"

Some cases have held that a mere willingness on the part of the locator to further expend his labor and means was a fair criterion. In respect to this Lindley on Mines (1st ed.) sec. 336, says:

"But it would seem that the question should not be left to the arbitrary will of the locator. Willingness, unless evidenced by actual exploitation, would be a mere mental state which could not be satisfactorily proved. The facts which are within the observation of the discoverer, and which induce him to locate, should be such as would *justify* a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property."

It is true that when the controversy is between two mineral claimants the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority. That, it is true, is the case before us. But even in such a case, as shown by the authorities we have cited, there must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or if it be claimed as placer ground that it is valuable for such mining.

Giving full weight to the testimony of Barieau we should not be justified, even in a case coming from a Federal court, in overthrowing the finding that he made no discovery. There was not enough in what he claims to have seen to have justified a prudent person in the expenditure of money and labor in exploitation for petroleum. It merely suggested a possibility that the ground contained oil sufficient to make it "chiefly valuable therefor." If that be true were the case one coming from a Federal court *a fortiori* must it be true when the case comes to us from a State court, whose findings of fact we have so often held to be conclusive.

The judgment of the Supreme Court of California is

Affirmed.